Rights of minority shareholders in the Netherlands

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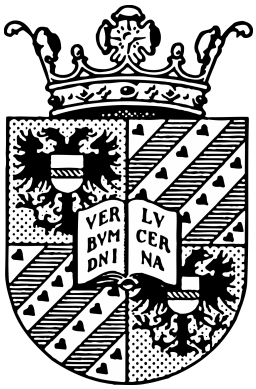

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Appendix I Shareholder structure in Dutch listed companies

I Sources of law

I.1 Introductory remarks

1. *Position of shareholders under Dutch company law.* Historically, the position of shareholders in Dutch companies has been rather weak, especially when compared with that of the board of directors.

Recent history has given us an excellent example of this. Faced with having to decide whether Gucci was allowed to issue a large number of shares to white knight Pinault-Printemps-Redoute (PPR) in order to fight off rival LVMH Moët Hennessy Louis Vuitton (LVMH), which had acquired a substantial stake in the company, without requesting the general meeting of shareholders' approval for this share issue, the Enterprise Section of the Amsterdam Court of Appeal ruled that acting in this manner did qualify as misconduct[1]. One of the reasons why Gucci objected to the substantial stake that LVMH had built up in Gucci was that by acting in the way it did LVMH would hurt the interests of the remaining shareholders in Gucci. These shareholders would lose control over Gucci to LVMH without receiving any compensation for this loss. However, the Enterprise Section refused to nullify the issue of shares with PPR because it would be too burdensome to reverse all the consequences of the transaction. This affair caused the Wall Street Journal to say that 'the Gucci case left many critics with the perception that the Netherlands isn't a shareholder-friendly country' and to conclude that holders of Dutch shares would not get a fair and equal treatment[2].

As far as we know, no serious investigation has ever been conducted into the question of why the board of directors of a Dutch company has such a strong position. A parallel may exist with other phenomena in Dutch society, most notably the trust Dutch citizens have always put in their government and the acceptance of a very indirect form of democracy. Whatever the reasons may be, the weakness of the position of shareholders has made it unnecessary to direct special attention to the position of minority shareholders. A consequence of this is that minority protection has never before been an important issue in Dutch company law[3].

The most important source of company law and of minority protection is Book 2 of the Dutch Civil Code. The current Book 2 is mainly that of 1976, with minor adaptations. The 1976

[1] See OK 27 May 1999, NJ 1999, 487. In this report, decisions from the Enterprise Section of the Amsterdam Court of Appeal (see also nos. 10 and 46-49) will be indicated with OK (Ondernemingskamer). Decisions of the Supreme Court of the Netherlands will be indicated with HR (Hoge Raad). Their most important decisions are published in the *Nederlandse Jurisprudentie (NJ) (Dutch Jurisprudence)* and are referred to by year of publication and by case number.

[2] Wall Street Journal, 22 December 2000.

[3] See Van der Grinten, *Minderheidsrechten (Minority rights)*, De Naamloze Vennootschap 70, 12 December 1992, p. 271-275. See for a dissertation on Dutch, English and South African company law dealing with minority protection in particular, H. Prins, *The protection of minority shareholders in a limited company: at English, South African and Dutch law*, dissertation Leiden, 1972.

version was based on the 1928 version, a version that took nearly 50 years to complete from the first draft until it came into force. An earlier draft, that of 1910 by the Nelissen committee, was fairly protective of minority shareholders' interests. After 1910, the 'rule of the majority' view gained momentum and in the 1928 final law, minority shareholder protection was reduced to an accessory theme[4]. Remarkably enough, the minister acknowledged that the new law did not protect minority shareholders as well as it should. The Explanatory Memorandum, for example, contains phrases like '… a fourth point has arisen, one which should not come so much to the forefront as the three principles mentioned earlier, but where it does appear, it often reveals shocking injustice, namely the position of the minority, currently as a rule completely left to the mercy of the arbitrariness of the majority[5]' and 'one should not say that the interests of the majority are the same as those of the other shareholders, so that there is no reason for special provisions to protect the interests of the minority[6]'. But, as the minister emphasised, the 1928 law is the result of a balancing of interests: protection of the minority shareholder on the one hand and efficiency in decision-making on the other[7].

2. *Shift in power in favour of shareholders.* Recently, we have witnessed a strengthening of the position of the shareholder at the expense of the power of the board of directors and the supervisory board. This shift in power in favour of shareholders may result in increasing attention for the position of minority shareholders in the coming years.

The shift in power in favour of the shareholder has many reasons, including a recent influential advice from the Social and Economic Council to the Dutch government and parliament[8], the pressure exercised by institutional investors on the Dutch government and companies to limit the use of anti-take-over devices[9], the expanding shareholder base in the Netherlands and the increasing number of foreign professional investors in Dutch companies. This strengthened position of shareholders has also resulted in increased attention for the position of minority shareholders in the Netherlands. A good illustration of this is the legislative proposal for a new section 2:118a that will give shareholders who hold 1 percent of the issued capital the right to place an item on the agenda of the general meeting of shareholders. Another example is the proposal for a new section 2:359h. According to the proposal, of which the new section 2:359h is a part, a shareholder who has provided 70% or more of the issued capital for longer than a year can ask the Enterprise Section of the Amsterdam Court of Appeal to lift any anti-take-over measures that are in place at the

[4] See Honee's contribution *De ontwikkeling van het vennootschapsrecht (The development of company law)* to *150 jaar Wetboek van Koophandel (150 years Commercial Code)*, Kluwer, 1989, p. 39 ('In that respect (*can a minority shirk the majority's decision)*, the 1910 Draft Nelissen went further than the Draft Heemskerk that led to the 1928 law').

[5] Explanatory Memorandum in *Ontwerpen van wetten op de vennootschappen en andere wijziging en aanvulling van de bepalingen omtrent de naamlooze vennootschap en regeling van de aansprakelijkheid voor het prospectus (Legislative drafts concerning companies and other amendments of and additions to provisions concerning the public company and the regulation of the liability for the prospectus)* , Gebr. Belinfante, The Hague, 1929, p. 39.

[6] Belinfante, p. 39.

[7] Belinfante, p. 39 ('The minority cannot always have the power to appeal against every decision taken by the general meeting . That would of course create a delay in the running of affairs, harmful to the prosperity of the company').

[8] Entitled A*dvies over het functioneren en de toekomst van de structuurregeling (Advice on the functioning and the future of the rules applicable to statutory two-tier entities)*, 5 January 2001.

[9] Influenced by the proposed 13th EC directive on company law concerning take-over bids. This proposal failed to win the required backing from the European Parliament, meaning that its future is now unsure.

company. Section 2:359h then states that the Enterprise Section can ask the petitioner to make an offer for the shares of the minority shareholders before lifting the anti-take-over measures.

However, even should the position of shareholders indeed be strengthened, this will not necessarily lead to an improvement in the position of minority shareholders. The reason for this is that approximately 1/3 of all listed Dutch companies are controlled by a large shareholder[10].

I.2 The concept of minority

3. Why minority protection? Before elaborating on the protection of minority shareholders in the Netherlands, it will be useful to make some short remarks on why minority shareholders should receive protection and what the ultimate goal of this protection should be. At least three different reasons justifying minority protection come to mind. First, if the Dutch legal system does not provide adequate protection of minority shareholders compared with foreign legal systems, foreign investors will not invest in Dutch companies and Dutch investors will increase their investments in foreign companies. Second, and related to the first point, weak protection of minority shareholders increases the average cost of capital for a company[11], putting it at a competitive disadvantage with foreign companies[12]. A final reason for an adequate protection of minority shareholders' rights is more normative. There seems to be no good reason why it should be considered fair and equitable to disproportionately disadvantage minority shareholders compared with larger shareholders, only on the grounds that they hold fewer shares. In our opinion, all shareholders, large or small, should receive adequate protection from the law.

4. Who is the minority shareholder? In Dutch legislation, established case law and doctrine, you can look in vain for a general definition of a minority shareholder. Dutch law assesses whether a specific right or action should be given to a minority shareholder on a situation-to-situation basis and also decides from case to case whether one qualifies as a minority shareholder. This decision whether one has a right or an action is usually described in Dutch law in terms of percentage of the issued

[10] We refer to an investigation conducted by J. Groot, a summary of which can be found in appendix I.
[11] Because minority investors will anticipate the weak protection the law offers them and will want to receive compensation for the increased risk they run.
[12] See also the interesting essay by R. La Porta, F. Lopez-de-Silanes, A. Shleifer and R. Vishny, entitled *Investor protection and corporate valuation*, October 1999, which finds evidence of the higher valuation of firms in countries with better protection of minority shareholders.

share capital, but sometimes also in terms of the absolute book value of the shares required, or as a combination of both. The fairness of this adherence to percentages in deciding whether a shareholder is a minority shareholder can be questioned. Dutch law, for instance, permits the issue of priority shares. These shares have special controlling rights attached to them, making it possible to control the company without holding a large percentage of the shares and without providing a large share of the company's capital. A consequence of this is that a shareholder providing the majority of the capital may sometimes not control the company. In such a case the 'majority' shareholder is effectively in a minority position with regard to the exercising of controlling rights. There are several other possibilities in Dutch law for a small shareholder to effectively control the corporation, even when another shareholder provides a larger percentage of the company's capital.

An example of this is controlling the company through the so-called pyramid structure. One of the Netherlands' best known companies, Heineken NV, is an example of this. The Heineken family owns the majority of the shares in a listed holding company, which in its turn holds the majority of the shares in Heineken NV, which is also listed. Through this construction, the Heineken family effectively controls Heineken NV, even though it only provides slightly more than 25% of the capital.

Another example is the issue of so-called preference shares that can be used should a hostile take-over threat be imminent. These preference shares have two main advantages. First, the pre-emption right for existing shareholders that applies to ordinary shares does not apply to preference shares (see section 2:206a(96a) subsection 2)[13]. Second, preference shares can be issued at par value. The issue of these shares at par value is allowed because they do not share in the liquidation surplus. In addition, the issuing company can decide that only 25% of the par value has to be paid in. Of course, the company retains the right to demand that the shareholder also pay in the remaining 75% of the par value of the share. Because the voting rights attached to the preference shares are equal to those attached to ordinary shares, it is possible to grant substantial voting power to a friendly third party relatively inexpensively. Both constructions allow a shareholder who only provides a small percentage of the company's capital to effectively control it, meaning that in many Dutch companies capital and control are not in line.

Another remarkable aspect of Dutch company law with regard to shareholding and control is the following. For smaller companies, the power to appoint the members of the board of directors and the members of the supervisory board lies with the general meeting of shareholders (sections 2:242(132) and 252(142)). This means that a large shareholder can also effectively control the company. However, with regard to larger companies[14], it is the supervisory board that appoints the members of the board of directors (section 2:272(162)). These members of the supervisory board are in turn appointed by the supervisory board itself

[13] In this report, when there is a section for both private and public companies, we first note the number of the section that contains the provision for the private limited company, followed by the corresponding number (between brackets) for the public limited company.

[14] Under Dutch law, a company is obliged to transform itself into a statutory two-tier company if it meets the following criteria. Its issued capital plus the reserves are at least NLG 25 million, the company has installed a works council according to a legal obligation and it employs at least 100 people on a regular basis.

(section 2:268(158)), resulting in the situation that much of the controlling power in the company has shifted from the general meeting of shareholders to the supervisory board. This can lead to the situation where a shareholder who is successful in developing his company is rewarded for this growth with loss of control over 'his own' company. In a recent advice[15], the Social and Economic Council has signalled this anomaly. It therefore suggests making an exception should all the shares be held by one natural person or by more natural persons pursuant to a mutual arrangement of co-operation. Under these circumstances, the company qualifies for the so-called 'weaker' statutory two-tier regime. The most important consequence is that the power to appoint the board of directors falls back to the general meeting of shareholders.

Under Dutch company law, capital and control are not necessarily in line, so it is, in our opinion, impossible to define the concept of 'minority shareholder' without bearing in mind the control situation in the company. Under normal circumstances, i.e., when none of the aforementioned structures are in place and capital and control are therefore in line, minority shareholders are those shareholders who contribute a significantly smaller percentage of the company's capital than the largest shareholder. However, when a company makes use of a specific control structure, whether that be priority shares, a pyramid structure, preference shares or the statutory two-tier regime, percentages lose much of their relevance. Under these circumstances we would define minority shareholders as those shareholders who, irrespective of the amount of capital they provide, are unable to exercise any significant form of control within the company[16].

5. What are minority rights? In Dutch company law several rights are given to all shareholders, irrespective of the number of shares they hold. Not all of these rights can be qualified as minority rights. The right to vote in the general meeting of shareholders, for example, will usually not be a minority right for two reasons. First, because this right is not specific to minority shareholders and second, because this right usually has no significant meaning for minority shareholders. In the event of a disagreement, they will be the ones to lose the vote at the general meeting of shareholders.

The same conclusion applies to the right to receive a dividend. In itself, this is not a minority shareholder's right. However, a situation can exist in which the general meeting of shareholders has legitimately decided on the destination of the profit, but the outcome of such a decision may be unreasonable or unfair to the minority. In such a case, Dutch company law

[15] Entitled Advies over het functioneren en de toekomst van de structuurregeling (Advice on the functioning and the future of the rules applicable to statutory two-tier entities), 5 January 2001.
[16] See in the same respect H. Prins, Protection of the minority shareholders in a limited company, dissertation 1972, Leiden, p. 7 ('The majority need not have more than 50% of the voting shares - the majority may have 'working control' of a company, that is, control with a less than 50% holding').

gives the minority shareholder protection. In the case of Van Rees v. Smits (Court of Appeal The Hague, 1 October 1982, NJ 1983, 393), the Court judged that the criterion to be used to decide this case was if 'the general meeting of shareholders in the light of the mutual interests and arguments could have reasonably come to this decision'. The Court ordered that not declaring a dividend was unreasonable because of the large reserves, the profit in the year in question, the good performance in the next year and because it had been customary to declare a dividend of 50% of the profit. This case is an excellent example of the *bona fides* that the general meeting of shareholders has to keep in mind in relation to minority shareholders. Later decisions show a similar view. See, for example, Court of Appeal Arnhem, 26 May 1992, NJ 1993, 182 in the case of Uniwest v. Van Klaveren, in which the Court explicitly decided that after nullification it was competent to decide on a reasonable dividend itself, in spite of the general meeting of shareholders' competence provided by the articles, and that such a decision has to be made based on information available to the general meeting of shareholders on the day the correct dividend decision should have been taken. See also HR 9 July 1990, NJ 1991, 51 (the Sluis case), in which the Supreme Court ruled that an inquiry can be initiated on the grounds that a company has not declared a dividend for several years, without an adequate reason for these decisions. This is even the case when this refusal to declare a dividend is based on the articles, when the decision not to declare a dividend is without adequate reason and the company refuses to co-operate with a change in the articles. These decisions are in line with older case law on the determination of the annual profit. In the case of Baus v. De Koedoe (HR 21 May 1943, NJ 1943, 484[17]), the Supreme Court decided that a person who is entitled to a share of the profit of a company is bound to the determination of the profit by the general meeting of shareholders, unless the determination of the profit conflicts with *bona fides*. The Supreme Court then defines a breach of *bona fides* as 'when in determining the profit, the company is pursuing a line of behaviour which, under the given circumstances, no reasonable acting company could have pursued in relation to those entitled to share in the profits'. Interesting in this judgement is also that the Supreme Court rules that when the company has breached the *bona fides* in the determination of the profit, the court is allowed to determine to what extent the determined profit needs to be altered in relation to the person that is entitled to a share in the profit.

In our opinion, for a right to be a true minority right, it needs to possess the characteristic that it creates the possibility that an outcome can be reached that is different from the outcome that the majority of the shareholders wish. This means that the minority shareholder can interfere through a minority right in the affairs of the company, thereby correcting the policies of the majority shareholder[18].

In order to classify the minority rights, it will be useful to apply Hirschman's theory of *exit, voice and loyalty*[19]. Hirschman states that a member of an organisation who does not agree with the conduct of affairs in the organisation has two options: exit and voice. Exit means that the person leaves the organisation[20], voice that he remains part of the organisation and tries to

[17] The Supreme Court had ruled earlier in this case; HR 13 February 1942, NJ 1942, 360. This judgement, too, concerns minority protection and is an excellent example of the 'abuse of majority power doctrine' that has historically dominated minority protection.

[18] See J. Kisch, *De minderheidsrechten van den aandeelhouder in de naamlooze vennootschap (The minority rights of the shareholder in the NV)*, De Naamloze Vennootschap 1940-1941, p. 35, hereafter referred to as Kisch.

[19] See A. O. Hirschman, *Exit, voice and loyalty: responses to decline in firms, organizations and states*, Harvard University Press, 1990 (reprint).

[20] With regard to the exit option, the distinction listed-unlisted plays an important role. Exiting from a listed company is usually easy because one can sell one's shares on the market. Exiting from an unlisted company is harder because no market exists for the shares; the shareholder who wishes to exit must find a buyer for his shares and the transfer is usually restricted by provisions in the articles.

alter the conduct of affairs, using his participation rights, from within. In Hirschman's theory, a feeling of loyalty towards the organisation may cause the member to opt for the voice option. As we will see in this report, the exit option is not elaborately given shape in Dutch company law. Even though we have not conducted any research ourselves into why this is the case and are also unaware of any existing research on this topic, we suppose that the Dutch preference for consensus plays a role in explaining this phenomenon. Generally speaking, whether it is in politics, business or social life, the Dutch have a tendency to settle conflicts by searching for consensus. Exit is seen as a mild form of betrayal; one should always first try to solve matters in good co-operation before leaving. Voice, on the other hand, is an option that has been dealt with extensively in Dutch company law. However, as with the exit option, one is not entirely free to exercise one's minority rights in the voice category as one would wish. The legitimate interests of others and of the company have to be taken into account.

Within the minority rights in the voice category, we draw a distinction between positive and negative rights. By positive rights we mean the ability to initiate policy by the company that would not have been pursued without the initiative. By contrast, negative rights refer to the possibility for a minority shareholder or a group of minority shareholders to block a resolution that is desired by the majority. In addition to these two categories we can mention a third: that of the so-called 'normalising' minority rights. These are rights that the minority shareholder can exercise to force the company to comply with statutory provisions or the articles of association[21]. In this report we will not treat these rights as a separate category since Dutch company law does not contain many of them[22].

I.3 History and characteristics[23]

6. Book 2 of the Civil Code. Dutch company law dates back some 400 years. The first Dutch public company was established in 1602. This was the 'Vereenigde Oost-indische Compagnie', a company responsible for shipping goods from the Dutch colonies in Asia back to the Netherlands[24]. Most of the Dutch company law can be found in Book 2 of the Dutch Civil Code. In addition to Book 2, Books 3 and 5 (on

[21] Kisch makse this same distinction into three categories. He first plotted 'correcting' mechanisms against 'directing' mechanisms and then subdivided these 'directing' mechanisms into positive and negative rights. See Kisch, p. 35.
[22] We can mention section 2:222(112), sections 999-1002 of the Code of Civil Procedure and to a certain extent, sections 2:345-359 and 2:15-16.
[23] For a description in English of some of the most important Dutch company law provisions, see the loose-leaf edition *Dutch business law; legal, accounting and tax aspects of doing business in the Netherlands* by S.R. Schuit, M. Romyn and G.H. Zevenboom, Kluwer Law International. An English translation of Book 2 of the Civil Code can be found in the loose-leaf edition *Companies and other legal persons under Netherlands and Netherlands Antilles Law*, editors H.C.S. Warendorf and R.L. Thomas, Kluwer Law International. This is the translation of the articles that we have used in this report.
[24] P. van Schilfgaarde, *Van de BV en de NV (Of the private and the public company)*, 11th ed., 1998, p. 29-32, hereafter referred to as Van Schilfgaarde.

property law), Book 6 (on law of obligations, including torts) and more specific laws are also relevant. Book 2 contains some 450 provisions and is divided into nine titles, of which for the purposes of this report one (general provisions), four (public limited companies), five (private limited companies), seven (merger and division), eight (rules on the settlement of disputes and right of inquiry) and nine (the annual accounts and the annual report) are the most relevant ones. Besides the topics already mentioned, Book 2 also contains provisions applicable to associations, co-operatives, insurance guarantee companies and foundations.

Dutch company law can be characterised as resembling English law, mainly in the sense that, as in English law, there is no fundamental difference between the BV (private limited company) and the NV (public limited company). Until 1971, the BV was an unknown figure in Dutch company law and even nowadays, the legislative regime governing the BV has been largely derived from that applying to the NV. German law has also influenced Dutch company law. One indicative example of that influence is the first title of Book 2 which covers general provisions on legal persons. A German, dogmatic, influence can be clearly discerned in that title. Finally, French law has also had an impact on Dutch company law, resulting from the French occupation of the Netherlands in 1810, which resulted in the introduction of the French Civil and Commercial Codes. In the years after 1813 these Codes were withdrawn, but the 1838 law on the public company still had a considerable number of French characteristics[25]. More recently, French influence can be discerned in the sections on directors' liability.

7. Some key concepts of Dutch company law. In this report we will focus solely on private and public limited companies,in Dutch the 'Besloten Vennootschap' (BV) and the 'Naamloze Vennootschap (NV). Of these two forms, only the NV has the capability of listing its shares on an exchange. For the BV a mandatory share transfer restriction has to be incorporated in the articles of association, making it effectively impossible to obtain a listing for this kind of share. It is interesting to note that so far, the distinction listed – unlisted has not had a major influence on the content of the company law.

The importance of the distinction listed – unlisted could increase in the future, with listed companies not only being subject to Dutch company law in the narrow sense, but also to Dutch securities law, which is becoming more important[26]. The distinction between listed and unlisted companies is relevant for the subject of minority

[25] For a more thorough discussion of the origins of Dutch company law, see E.J.J. van der Heijden and W.C.L. van der Grinten, *Handboek voor de naamloze en de besloten vennootschap (Handbook for the public limited and the private limited company),* 12th ed., 1992, p. 1-42, hereafter referred to as Van der Heijden-Van der Grinten.

protection. The minority shareholder in a listed company has an exit option by way of the capital market on which the shares of the company are listed. The transfer of shares in a unlisted company can be very burdensome. A consequence of this is that the minority shareholder can be caged in its company.

Under Dutch company law the rules for the settlement of disputes purport amongst other things to provide an oppressed minority shareholder with a possibility to leave the company. See further no. 65.

Dutch company law has a two-tier system, with both a board of directors and a supervisory board. This supervisory board is optional for 'normal' public and private limited companies but mandatory for the so-called 'statutory two-tier companies' (sections 2:262-274(152-164) oblige certain companies to install a supervisory board). Hereafter we will refer to these companies as 'statutory two-tier companies' (see for this type of company also no. 4). In general, these statutory two-tier companies are the larger companies. The task of the supervisory board is described in section 2:250(140) as being one of supervision and advice. In this task, however, it is not allowed to limit itself to serving the interests of shareholders only. Its goal should be to act in a way that is supportive of the interests of the company as a whole[27].

8. The vague provisions of Book 2. Dutch company law is mainly statutory in nature. These statutory sources contain many vague provisions, making court decisions that explain and fill in these provisions an important source of law. Examples of these provisions include section 2:8 (the obligation to conduct oneself in accordance with the dictates of *reasonableness and fairness*, see also no. 9), section 2:15 (a resolution may be declared null and void on the grounds that it is contrary to the principles of *reasonableness and fairness*), section 2:343 (the obligation for shareholders to acquire another shareholder's shares if the continuation of his shareholding can no longer *reasonably be expected* of him) and section 2:350 (the Enterprise Section allows an inquiry if there appear to be *well-founded reasons* to *doubt the correctness of the policy*).

[26] See in this respect L. Timmerman, *De zere plek van het Nederlandse en Europese vennootschaps- en effectenrecht (The Achilles heel of Dutch and European company and securities law)*, Ondernemingsrecht, 2000, no. 15, p. 420-426.
[27] See also HR 1 April 1949, NJ 1949, 465.

9. The key provisions of Book 2. Dutch company law has its foundations in three important general provisions: sections 5, 8 and 25.

Section 2:5

With regard to the law of property, contract, tort and succession, a legal person is equivalent to a natural person, unless the contrary follows from the law.

The starting-point is that a legal person has the same rights and obligations as a natural person: the company itself is a subject under the law. Important for this report is that this section also prevents minority or other shareholders from claiming damages from a third person for any damage that this third person has caused the company. Only the company itself, as a subject under the law, can claim damages from the third person; the mere fact that the shareholders' shares have declined in value is not grounds for a separate action by the minority shareholders[28]. This rule, developed in case law, is very important. It excludes a derivative action by minority shareholders (see further no. 60).

Section 2:8

1. *A legal person and the persons who by virtue of the law and its articles are concerned with its organisation must, in such capacity, conduct themselves in relation to each other in accordance with the dictates of reasonableness and fairness.*
2. *A rule which binds them by virtue of the law, usage, the articles, by-laws or a resolution shall be inapplicable to the extent that, in the circumstances, it is unacceptable according to the criteria of reasonableness and fairness.*

This section can be seen as the guidelines for behaviour for those persons who form part of the organisation of a company. It should be emphasised that in Dutch company law, the dictates of reasonableness and fairness play a key role. Matters that are unregulated in Dutch company legislation are decided on the basis of these dictates. Section 8 subsection 1 does more than merely indicate a guideline for behaviour. A direct link exists with section 15 that states that any resolution may be declared null and void if it does not live up to the standard set by the requirements of reasonableness and fairness. Another specification of section 8 can be found in

[28] This matter was first decided in the case of Poot v. ABP, HR 2 December 1994, NJ 1995, 288.

section 201(92) subsection 2, which contains the obligation for the company to treat all shareholders whose circumstances are equal in an equal manner.

Important in section 8 is the second subsection. This subsection codifies the so-called 'derogatory' effect of reasonableness and fairness. It states that a valid rule, for example a statutory rule, will not be applied when this would be unacceptable according to the criteria of reasonableness and fairness. In the context of Dutch private law as a whole, this provision is understandable; it is merely a rewriting of sections 6:2 and 6:248, which contain the same complementary and derogatory effect of reasonableness and fairness for contract law. The derogatory effect of the principle of reasonableness and fairness makes Dutch company law flexible. It can be interpreted according to the specific requirements of a case[29].

Section 2:25
No derogation from the provisions in this Book shall be permitted, except and insofar as otherwise appears from the law.

Section 25, finally, states in principle that the provisions in Book 2 are of a mandatory nature. This also means that those provisions in Book 2 that protect minority shareholders are mandatory. However, the legislator sometimes explicitly or implicitly allows derogation from a provision. This derogation can usually be found in the articles of association or sometimes in an 'ordinary' agreement. Examples of provisions that have the capability to protect minority shareholders but that are dispositive include sections 335-343 (rules on the settlement of disputes between shareholders) and section 256(146) (that regulates what to do in the event of a conflict of interest between the company and one or more of its directors). Both rules contain an opt-out clause for the shareholders; they are free to arrange otherwise in the articles of association.

10. The Enterprise Section of the Amsterdam Court of Appeal. We do not consider it necessary for the present purposes to describe the Dutch courts system in detail. However, some aspects do deserve special mention. First, the Dutch system has a special court that deals specifically with company law questions. This is the

[29] See for relevant case law: HR 20 October 1989, NJ 1990, 308. It can be contrary to the principle of reasonableness and fairness for a member of the board of directors to invoke a granted discharge.

Enterprise Section of the Amsterdam Court of Appeal. This court is only competent if the legislator has specifically determined so, but it plays a pivotal role in Dutch company law. Its main task is to decide whether there appear to be well-found reasons to doubt the correctness of the policy of the company under investigation, in which case it may order an inquiry. If the Enterprise Section decides on the basis of the inquiry that there has been a case of misconduct, the Enterprise Section also decides which measures to take, which can include far-reaching measures like the nullification of a resolution, the dismissal of a director or even the winding-up of the legal person, see further nos. 46-49). It is interesting to note that the Enterprise Section is not entirely made up of lawyers but that two of the five judges are laymen, usually accountants or former entrepreneurs. Decisions by the Enterprise Section can be reviewed in cassation by the Supreme Court.

Looking at the history of the Enterprise Section, we see that since 1971, when it was established, its competence has gradually increased. Right from the start it has been the competent court in the above-mentioned inquiry proceedings. Since 1988 it is also been competent to decide in buy-out proceedings of small minority shareholders (section 2:201a(92a)), and since 1989 it has been the competent court for appeal proceedings concerning the rules on the settlement of disputes (sections 2:335-343). In the near future it will see its jurisdiction expand even further; it will become the court that decides whether or not to lift anti-take-over devices once a shareholder has provided 70% or more of the issued capital for over a year.

Examining the inquiry proceedings in more detail, we find in section 2:349a the possibility to ask the Enterprise Section to take immediate measures once an inquiry proceedings has been initiated. Usually the Enterprise Section will hear the request for immediate remedies within a week, and rule immediately after hearing the case. The Enterprise Section can grant immediate measures when such are required in connection with the condition of the legal person or in the interest of the inquiry. The Enterprise Section has turned out to be willing to grant immediate remedies, usually in the form of some sort of stand-still measure but not limited to this.

In addition to the inquiry proceedings before the Enterprise Section, there is also the general possibility to ask the President of the District Court by way of an interim provision (Kort Geding) to take any measure considered necessary. Before 1994 this

was the only possibility to quickly obtain a legal remedy. Since 1994 however, the possibility to ask the Enterprise Section to take immediate measures has more or less replaced the traditional Kort Geding proceedings once inquiry proceedings have been initiated. Standing case law states that, if an inquiry has been initiated, the president in Kort Geding must adopt a reticent attitude when asked to provide immediate remedies and to limit these to situations in which the demanding party has a very urgent interest[30]. However, it remains possible to initiate Kort Geding Proceedings when the plaintiff has no or no immediate interest in a full inquiry but still desires a short-term measure[31]. The interim provision in Kort Geding Proceedings must be based on grounds outside the inquiry proceedings, usually tort law[32].

I.4 Rules protecting minority shareholders

11. Methods of protection of minority shareholders. In Dutch company law, rules protecting minority shareholders are mainly but not exclusively statutory in nature. As a result of the fact that minority shareholder protection has never received much attention, protection provisions are found scattered over several sources, both in 'hard' law and in 'soft' law. Another distinction that can be made is between provisions that provide minority protection in the narrow sense, usually giving shareholders certain rights and a remedy to effectuate these rights, and rules that are primarily directed at improving the availability of information and of market transparency. This second set of rules usually has as a side-effect an improvement in the position of minority shareholders. We will refer to this method of protection as protection in the broad sense. We will now discuss eight sources of minority shareholder protection.

12. Book 2 of the Dutch Civil Code. Book 2 of the Dutch Civil Code may be regarded as the most important source for minority shareholders protection. It can be characterised as 'hard' law and provides protection in the narrow sense. Perhaps its most fundamental provision offering protection for minority shareholders is section 2:201(92).

Section 2:201(92)

[30] See Amsterdam Court of Appeal, 7 November 1996, KG 1997, 3 and TVVS 1997, p. 56.
[31] See 's-Hertogenbosch Court of Appeal, 22 January 1996, JOR 1996, 22.

1. *Except as is otherwise provided for in the articles, all shares shall rank pari passu in proportion to their amount.*
2. *A company limited by shares must treat shareholders and holders of depository receipts whose circumstances are equal in the same manner.*

In subsection 2 we find the principle of equality for company law. This provision was introduced in Dutch company law in 1981 as a implementation of the EC's second company law directive. We will deal with the principle of equality more extensively in nos. 41-42.

Other important provisions for the protection of minority shareholders in Book 2 are sections 2:15 about the nullification of resolutions, section 2:220(110) about the right for shareholders who together hold a certain percentage of the shares to convene a general meeting of shareholders, section 2:343 providing a shareholder an exit-opportunity in case the continuation of his shareholding can no longer be reasonably expected of him due to the conduct of other shareholders, and section 2:344-359 about the right to demand an inquiry.

13. Book 3 of the Dutch Civil Code; class action. Book 3 of the Dutch Civil Code, on property law in general, contains two important provisions for minority shareholders. The first is section 3:13, which contains the provision that one cannot exercise any power that one possesses to the extent that the exercise would imply abusing this power. It is an elaboration of the dictates of reasonableness and fairness of section 2:8 of the Civil Code. The second important section for minority shareholders in Book 3 is section 3:305a. This section allows minority shareholders (but is not limited to them) to organise into an association or a foundation and to have the entity bring an action against the company for the benefit of the collective. It is not possible for the entity to sue for damages but it is able to request a declaratory judgement. With this declaratory judgement, the individuals involved can then sue for damages. An association or foundation is entitled to initiate a class action if the association or foundation, according to its articles of association and in practice, protects the same interest as the interest of the individuals that has been violated and that the interests are fit for bundling. Representativeness is not a condition or a hurdle, especially not when the association or foundation limits its actions to its members. The Supreme

[32] See HR 10 July 1989, NJ 1989, 786.

Court has described the value of the proceedings in terms of 'increasing the efficiency and effectiveness of legal protection'. Section 3:305a also reduces the cost of litigation. These costs can be high (as in most other countries), caused among other things by the obligation to be represented by counsel (the maxim '*nul ne plaide par procureur*' applies in the Dutch context) and the danger of being ordered to also pay the other party's legal costs.

Section 3:305a came into force in 1994. However, similar proceedings were possible before 1994 based on more specific legal provisions and judicial decisions. The opportunity that section 3:305a offers is widely used, for example in proceedings concerning liability for mistakes in prospectuses or by consumer care organisations in a wide variety of proceedings. A very illustrative example in this respect are the proceedings initiated by the Vereniging van Effectenbezitters (VEB, Association of Securities Owners) against Philips NV[33]. The grounds for the proceedings was the allegation that Philips had withheld relevant information from the public or at least that it had not disclosed this information as soon as possible. According to the VEB a consequence of this behaviour was that Philips committed a tort against a certain group of its investors. The Supreme Court ruled that the VEB, which initiated the proceedings under its own name, could not be seen as the legal representative of the prejudiced investors, even though it looked after the interests of these investors. This also led the Court to decide that Philips could not demand that the VEB submit a list to Philips containing the names of all those that had turned to the VEB to look after their interests when first bringing the case before a court. However, the Supreme Court decided that the claim of the VEB for a declaratory judgement could be sustained under the rules of section 3:305a. The case was settled out of court soon after this decision by the Supreme Court.

14. Code of Civil Procedure. This book contains three relevant sets of provisions for the protection of minority shareholders (see also nos. 38 and 46). These are first, sections 999-1002, which concern the annual accounts, the annual report and the information that has to be added to the accounts and the report. Any affected party can demand that the company alter the aforementioned documents and bring them into line with a legal injunction, provided by the Enterprise Section of the Amsterdam Court of Appeal. Refusal to do so is a criminal offence. Second, section 214 offers minority shareholders the opportunity to request a provisional examination of witnesses in preparation for proceedings which are being considered. Finally, section 843a offers minority shareholders the opportunity to demand in court that they will be allowed to inspect a private instrument both during and outside the general meeting of shareholders.

15. Commercial Code. In sections 8 and 11, the Commercial Code contains two provisions that can be applied to protect the interests of a minority shareholder (see

[33] See HR 7 November 1997, NJ 1998, 268.

also no. 46). Section 8 gives a minority shareholder the right to ask the court to demand the disclosure of the books and documents that the company is obliged to keep by law during legal proceedings. Section 11 of the Commercial Code contains the obligation to submit the entire accounts to the other party in legal proceedings. This obligation to submit is restricted in the sense that it only exists with regard to 'partners', while it is uncertain at best whether a minority shareholder qualifies as a partner.

16. Securities Transaction Supervision Act 1995. This statute can be regarded as 'hard' law and it mainly provides protection in the broad sense. For the purposes of minority shareholder protection, three aspects seem relevant. First, sections 3-6 prohibit the issue of shares to the public unless the company has made sure that adequate information is available to the investors. Second, sections 29-42 regulate the control and supervision of the securities markets by the Minister of Finance, or by other entities after delegation; the Minister of Finance has delegated his powers to the Stichting Toezicht Effectenverkeer. Finally, sections 46-47 make insider trading a criminal offence. Recently, rules relating to a public offer have been incorporated into the Securities Transaction Supervision Act 1995. The purpose of these rules is to ensure that shareholders receive adequate and timely information about the public bid.

17. Disclosure of Major Holdings in Listed Companies Act 1996. This is again a statute and therefore 'hard' law, providing protection to minority shareholders through the improvement of market transparency and information provision. This statute obliges anyone who passes certain shareholding thresholds in either direction to report this to the company and the Minister of Finance, who will make the information available to the public. Again, the Minister of Finance has delegated his powers under this statute to the Stichting Toezicht Effectenverkeer.

18. Listing and Issuing Rules. These are rules developed by the Amsterdam Exchange, which is now a subsidiary of the Euronext Exchange, and to which a company that seeks a listing is bound through the listing agreement it enters into with the exchange. They can therefore be characterised as legally binding, but only in the relationship between the listed company and the exchange. The rules contain several provisions that protect minority shareholders. Examples are sections 8-24, which contain the obligation to make a prospectus available when issuing securities and that

give detailed information on what to include in the prospectus. A second example is section 26, which explicitly states that the issuing company is obliged to treat all shareholders who are in equal circumstances in an equal manner. Finally, section 28 is an important section., giving a detailed overview of the information that the issuing company has to provide to the public. It contains the general obligation to make available all the facilities and information necessary for the shareholders to be able to exercise their rights. The most important, more specific, obligation can be found in section 28h. This provision contains the obligation to immediately make available a publication on every fact or event concerning the issuing company that can be expected to significantly influence the price of the company's stock.

Historically, there has been a great deal of criticism about the way that the Amsterdam Exchange has reacted to alleged violations of the Listing and Issuing Rules. Not only are they 'soft' law, their enforcement was also unsure and inconsistent. In order to respond to this criticism, a new section 65a was added to the Listing and Issuing Rules. This section enabled the establishment of the Advice Committee Listing and Issuing Rules[34] as of 1 January 2000. The task of this Committee is to advise the Amsterdam Exchange about alleged violations of the Listing and Issuing Rules. In 2000, the Committee investigated seven cases. In six of these cases, it found that the issuing company had violated the Listing and Issuing Rules. Of these six violations, five were violations of the above-mentioned section 28h. The establishment of this Committee has made the decision process more transparent and reduced the conflict of interests that the Amsterdam Exchange faces when confronted with an alleged violation. After all, it has a commercial interest in not punishing the issuing company too severely in order not to endanger the company's listing.

19. Corporate Governance in the Netherlands; report by the Peters Committee. In 1996 and 1997, the Corporate Governance Committee (also called the Peters Committee after its chairman) presented two reports[35] (a draft and a final version). Among other things, these reports contained 40 recommendations concerning corporate governance in the Netherlands. The report mainly focuses on the relationship between the board of directors, the supervisors and the shareholders. It pleads for a strengthening of the position of shareholders and urges them to participate more actively in the affairs of the company. The report is an example of a code of best practice in the sense that it is not legally binding; it merely makes recommendations. However, it does try to improve the position of the shareholder in a direct way. Examples include recommendation 26, which asks companies and

[34] Also referred to as the Committee Herkströter (former Royal Dutch Shell CEO) after its chairman.
[35] Commissie Corporate Governance, *Corporate Governance in Nederland: Een aanzet tot verandering en een uitnodiging tot discussie (Corporate Governance in the Netherlands: An initial impetusfor change and an invitation for discussion)*, 28 October 1996 and Commissie Corporate Governance, *Corporate Governance in Nederland: Veertig aanbevelingen (Corporate Governance in the Netherlands: Forty recommendations)*, 25 June 1997.

investors to reassess the role played by shareholders, based on the principle that capital and control should be in line, and recommendation 29 which asks management to assess the desirability of an increased influence of investors and how to achieve this. Recommendation 27, the general meeting of shareholders should be the forum to which the supervisory board and the board of directors report and are accountable, recommendation 28, the board of directors and the supervisory board should have the confidence of the general meeting of shareholders, and recommendation 30, requests made by investors who represent 1% of the issued capital or NLG 500,000 in shares to have items placed on the agenda should in principle be honoured, are more detailed.

It was left to companies to voluntarily adopt the recommendations. Evaluation showed that only a small percentage of Dutch firms made significant changes to their corporate governance policy and that conformation was particularly weak with regard to those recommendations concerning increased shareholder power[36]. Therefore, the Dutch government has started to translate some of these recommendations into legislation. A good example is the proposal for a new section 2:114a that will give shareholders who hold 1 percent of the issued capital or shares with a market value of € 50 million (this concerns listed companies) the right to place an item on the agenda of the general meeting of shareholders. This is a direct legal translation of recommendation 30 of the Peters Committee. Another example is a legislative proposal that contains the rule that adoption/approval of the annual accounts does not imply a discharge for the board members from liability for their management. In the proposal, both have to be separate items on the agenda of the general meeting of shareholders.

Finally, Dutch insolvency law does not contain any provisions that are specifically related to the position of the minority shareholder.

II An overview of minority rights

II.1 Thresholds for minority shareholders' rights (positive minority rights)

20. Overview. Scattered throughout Book 2 of the Civil Code, there are several different thresholds for minority shareholders to qualify for a right. The most important positive minority shareholders' rights are listed below, including the

[36] See, for example, the report from the Vereniging van Effectenbezitters (Association of Securities Owners), entitled *Rapport Corporate Governance bij AEX-fondsen (Evaluatie en rating van Corporate Governance-inspanningen van 25 AEX-fondsen) (Report Corporate Governance at AEX-companies (Evaluation and rating of the Corporate Governance efforts of 25 AEX-companies))*, 22 October 1998, the report of the Monitoring Committee, entitled *Monitoring Corporate Governance in the Netherlands*, 3 December 1998, and the government's reaction to this report in a letter from the Minister of Finance to the Dutch Parliament (25 732, no. 8, 10 May 1999). In this letter, the Minister also proposes several changes in legislation to incorporate the Peters recommendations.

number of shares the shareholder has to hold in order to be able to exercise the corresponding right. This description is followed by an overview of the blocking rights that Dutch company law gives to minority shareholders. This chapter ends with a paragraph about access to the shareholders meeting.

21. A single share. The following rights attached to a single share are minority rights. They possess the characteristic that they open the possibility to reach an outcome that is different from the outcome that the majority of shareholders wish.

Section 2:222(112)

The right to convene a general meeting of shareholders when those who are authorised under section 2:219(109) or the articles have failed to do so, but only after authorisation by the President of the District Court. For an NV, this right exists with regard to the general meetings described in section 2:108 and 108a. These are the mandatory annual general meeting of shareholders and the mandatory general meeting of shareholders should the board of directors consider it plausible that the shareholders' equity of the company has decreased to an amount equal to or less than one-half of the paid and called-up part of the capital. For a BV, the right only exists with regard to the mandatory annual general meeting of shareholders. Section 2:222(112) is an example of a normalising minority right (see no. 5).

Section 2:343

The right to demand in court that one's shares will be acquired by other shareholders when one's rights or interests are prejudiced by the conduct of one or more co-shareholders to such an extent that the continuation of the shareholding can no longer reasonably be expected of one. It is important to remember that only the conduct of the other shareholders is relevant, not the conduct of the company. The existence of a relationship between the conduct of the shareholders and their shareholding is not required[37].

Sections 999-1002 Code of Civil Procedure

[37] See the case of Van Eyk v. Nootebos, OK 22 October 1992, NJ 1993, 411 ('it must be judged that the claim from the minority shareholder can also succeed should his interests be prejudiced by the conduct of one or more co-shareholders, other than in their capacity of shareholder, to such an extent that the continuation of his shareholding can no longer reasonably be expected of him) and OK 9 December 1993, NJ 1994, 296.

The right to request the company to alter the annual accounts and annual report and to bring them into line with a legal injunction. These sections are also an example of a normalising minority right (see nos. 5 and 38).

22. 5% of the issued capital[38]

Section 2:331

The right to prevent a transferee company resolving to merge by a resolution of the board of directors. Under normal circumstances a company merges by resolution of its general meeting of shareholders (section 2:317 subsection 1). However, the law makes an exception to this rule for the transferee company on the grounds that for such company a merger can possibly be of little importance and does not substantially affect the position of the shareholders[39]. If the articles do not prevent this, and if the company has stated its intention to do so in the published notice of the deposit of the merger proposal, a merger by a resolution of the board of directors is possible. However, subsection 3 enables a group that represents at least 5% of the issued capital to prevent this by requesting the board of directors to convene a general meeting of shareholders to decide on the merger within one month after such publication.

Section 2:334ff

The right to prevent the transferee company resolving upon the division by a resolution of the board of directors. This right is comparable with the right to prevent a the company resolving to merge by a resolution of the board of directors.

23. 10% of the issued capital

Section 2:220(110)

The right to convene a general meeting of shareholders. This right is restricted in several ways because convening a general meeting of shareholders without the consent of the board of directors amounts materially to a deed of mistrust and can thereby harm the interests of the company. First, before being able to convene a general meeting, the group of shareholders needs the authorisation of the President of the District Court. The President shall disallow the application if it does not appear

[38] Or such lesser amount as is provided in the articles.
[39] See Van der Heijden-Van der Grinten, no. 411.

that the applicants have previously requested the board of directors and the supervisory board in writing to convene a general meeting, stating the exact matters to be discussed. If neither the board of directors nor the supervisory board have taken the necessary steps to ensure that the requested meeting could be held within six weeks of the request, the application may be granted.

Section 2:346

The right to ask for an inquiry[40]. This right will be discussed in more detail in nos. 46-49.

24. 1/3 of the issued capital

Sections 2:336 and 2:342

The right to demand in court that a shareholder, usufructuary or pledgee of a share who has the right to vote transfers his shares or his voting right should his conduct prejudice the interests of the company to such an extent that continuation of his shareholding or of his exercise of the voting right cannot reasonably be tolerated.

25. Analysis of the above-mentioned thresholds. The rights of shareholders or a group of shareholders who have reached a certain threshold refer to four different criteria: a single share, 5%, 10% and 33 1/3%. First, it is interesting to note the low threshold for asking for an inquiry. Even though the initial hurdle seems rather high, 10% of the issued capital, it is significantly lowered by stating that it also suffices to hold shares with a nominal value of € 225,000. Especially for large companies, this € 225,000 threshold is much lower than the 10% of the issued capital hurdle. This cannot but reflect the fact that the Dutch legislator has considered it necessary for the inquiry proceedings to provide adequate protection to (smaller) minority shareholders.

However, one should not forget that holding shares with a nominal value of € 225,000 does not in itself yet make it possible to start an inquiry; it merely gives the shareholder(s) or group of shareholders the right to demand that the Enterprise Section initiate an inquiry. It is still up to the Enterprise Section to decide whether there are well-founded reasons for doubting the correctness of the policy, in which case it may order an inquiry (see further nos. 46-49).

[40] Usually it is not necessary to reach the 10% threshold because € 225,000 in nominal value of the shares also suffices.

A second interesting point is that Dutch company law contains four different hurdles for exercising minority rights. However, there does not seem to be any coherent thought behind this division into four categories. There seems to be no reason why, for example, a minority shareholder should require only 5% before being able to exercise the right to prevent a transferee company resolving to merge by a resolution of the board of directors, but 10% before he is able to exercise the right to convene a meeting of shareholders.

II.2 Qualified quorums and majorities (negative minority rights)

26. Negative minority rights. Negative rights refer to the possibility for a minority shareholder(s) or group of shareholders to block a resolution that is desired by the majority. The most important legal provisions that provide blocking power to a minority are listed below. The headings indicate how large the majority has to be in order not to be affected by the dissent of the minority.

27. Blocking power for a single shareholder.

Section 2:15

The right to ask for nullification of a resolution if the shareholder who requests nullification has a reasonable interest in the due performance of the obligation which has not been performed (see section 2:15 subsection 3 sub a). This right can be exercised with regard to a resolution by any constituent body of the legal person. Subsection 1 mentions the following grounds for nullification. First, the resolution is contrary to statutory provisions or provisions in the articles regulating the passing of resolutions. The law only contains procedural rules for the passing of resolutions by the general meeting of shareholders and not for the board of directors or the supervisory board. However, these can be provided in the articles. Second, the resolution is contrary to the principles of reasonableness and fairness required under section 2:8. In judging whether the resolution meets the standards of reasonableness and fairness, the interests of the company itself take an important place (see for the interests of the company no. 35). The interests of the company may result in the resolution meeting the standards of reasonableness and fairness, even though other

interests may be harmed[41], but it may also result in the resolution not meeting the requirements of reasonableness and fairness, even though other interests are served by the resolution. It should be noted that the principles of reasonableness and fairness leave the constituent body a margin of appreciation: 'was it reasonably possible for the constituent body to reach this decision?' is the criterion to be applied. Third, a resolution may be nullified on the grounds that it is contrary to any by-laws. In practice, this third reason does not play an important role for NVs and BVs. Finally, section 2:15 subsection 1 contains the clause 'without prejudice to any other statutory provision entitling avoidance'. This opens up the possibility to seek nullification on grounds outside Book 2. Sections 3:44 and 45 are relevant in this context; grounds for nullification can also lie in the existence of threat, deceit, abuse of circumstances or harm of creditors. Whether error is also a ground for nullification in company law is not clear.

Van Schilfgaarde argues that section 6:228 (concerning error in contract law) can also be applied analogously to company law due to the provision of section 6:216, which states that sections 6:213-260 may in general also be applied to other multilateral proprietary legal acts[42]. Maeijer and Van der Grinten[43] do not agree with this view. They both argue that resolutions are legal acts by a legal person and not proprietary legal acts. They consider application by analogy impossible in this matter. However, in their opinion a person that has acted in error may under certain circumstances demand nullification of the resolution on the basis of conflict with the principles of reasonableness and fairness.

Section 2:204a,b(94a,b)

This section requires either all incorporators or all shareholders to agree. A description and accountant's certificate shall not be required if, among other things, all incorporators have resolved to waive the preparation of the description by the experts. Under normal circumstances a description and an accountant's certificate are required if, on incorporation or later, a non-cash contribution shall be made on the shares. The description of the contribution has to state the value attached to it and the methods used to determine this value. The accountant then declares that this contribution at least equals the amount payable as a capital contribution expressed in currency.

[41] See the Supreme Court judgement in the case of 'De Doetinchemse IJzergieterij', HR 1 April 1949, NJ 1949, 465.
[42] See Van Schilfgaarde, no. 96 ('Nullification on the grounds of error seems possible to me. Sections 6:228 and 216 offer the basis therefore').
[43] See Asser-Van der Grinten-Maeijer, *Vertegenwoordiging en rechtspersoon; de rechtspersoon (Representation and legal person: the legal person)*, no. 134 ('We would assume that the characteristic nature of a resolution as a legal act prevents such a resolution being nullified on the basis of error') and

Section 2:323

The right to ask for avoidance of a legal merger if the requesting shareholder has a reasonable interest. This section lists four grounds for avoidance of a legal merger, the first three of which are relevant for NVs and BVs. For the protection of minority shareholders, the right to declare avoidance of the merger on the grounds of avoidance of a resolution of the general meeting of shareholders required for the merger is particularly relevant.

Section 2:231(121)

Subsections 1 and 3 limit the amendment of the articles of association. They state that if the articles exclude the power to amend certain provisions in the articles from the general meeting of shareholders or even completely exclude the power to amend the articles, such is nevertheless possible by a unanimous vote at a general meeting of shareholders at which the entire issued capital is represented.

Section 2:334u

The right to ask for avoidance of a division of the legal person if the requesting shareholder has a reasonable interest. Generally speaking, the division of a legal person can be declared void for the same reasons as apply to a legal merger.

Section 2:238(128)

The articles of association may contain a provision that allows for the passing of resolutions by shareholders outside the context of a general meeting of shareholders. Relevant in this context is that even should the articles explicitly provide this option, resolutions may only be passed by a unanimous written vote of the shareholders entitled to vote.

28. 90% of the issued capital (blocking power when the minority group possesses more than 10% of the issued capital).

Section 2:18

Van der Heijden-Van der Grinten, no. 224.1 ('We would not assume the possibility of nullification of a resolution on the basis of error').

A resolution to convert, passed in accordance with the requirements for a resolution for an amendment of the articles, and a 9/10 majority of the votes cast at the general meeting of shareholders are needed for a conversion from one legal entity into another. This means that a minority group that has more than 10% of the votes at the general meeting can block a conversion from a private or public limited company into another legal entity. However, this blocking power does not exist when a public limited company is converted into a private limited company or vice versa (subsection 3). In such a case, only the requirements for a resolution to amend the articles have to be taken into account.

Section 2:181(71) subsection 2

These sections give an additional right to minority shareholders. This right can be characterised as a positive right but will be discussed here because it is attached to the right embedded in section 2:18. When a public or a private limited company is converted into an association, a co-operative or an insurance guarantee company one loses the quality of shareholder and becomes a member. Because this conversion fundamentally changes one's proprietary rights position, section 2:181(71) offers any shareholder who has not consented to the conversion resolution the right to request that the company indemnify him for the loss of his shares.

Even though section 2:181(71) subsection 2 does not mention the conversion into a foundation, several writers[44] have argued that the same protection for minority shareholders also exists when a public or private company is converted into a foundation. Logic seems to demand this, since conversion from an NV or BV into a foundation has a comparable affect on one's proprietary rights position, even though it is legally impossible to become a member of a foundation. The legal impossibility to become a member of a foundation is in our opinion also the reason why subsection 1, which states that on the conversion of company limited by shares under section 2:18 into an association, co-operative or mutual insurance company each shareholder shall become a member unless he has demanded indemnification, does not prevent an analogous application of subsection 2 on the conversion into a foundation.

29. 2/3 of the votes cast (blocking power when the minority group possesses more than 1/3 of the votes cast).

Section 2:206a(96a) subsection 7

[44] These include Maeijer ('One must assume that subsections 2 and 3 of these sections are also applicable in the case of conversion from an NV or a BV into a foundation', Asser-Maeijer, 2-III, no. 549) and Van der Grinten ('The same is, in our opinion, also applicable to the conversion from an NV or BV into a foundation', Van der Heijden-Van der Grinten, no. 157).

In the event of a capital increase, there is in general a pre-emption right for the existing shareholders. However, section 2:206a(96a) subsection 6 states that this pre-emption right may be restricted or excluded and that the general meeting of shareholders can transfer its powers in this matter to another constituent body. Subsection 7 then states that for these decisions, a 2/3 majority of the votes cast is required if less than half of the issued capital is represented.

Section 2:99 subsection 6

A reduction of the capital is possible by a resolution of the general meeting of shareholders. For the NV, this resolution requires the approval of 2/3 *of the votes cast* if less than half of the issued capital is represented at the meeting. There is no corresponding section for the BV, mainly due to the fact that this provision serves to protect the shareholders not present at the meeting. The underlying view was that shareholders in a BV have closer links with the affairs of the company and that they will sooner appear at a meeting should they disagree with a proposed resolution[45].

Section 2:330

This section contains a provision concerning the majority required for a legal merger.

Dutch law recognises three different types of mergers. Apart from the legal merger mentioned above, there is also the asset acquisition and the share acquisition. A characteristic of the asset acquisition is that the acquiring company acquires all the assets from the acquired company. Such a transfer requires the approval of the general meeting of shareholders (section 2:217(107)), since it is not a power specifically conferred upon the board of directors or others. What is relevant for minority shareholders may be that transfer of all assets could be seen as necessarily transgressing the object of the company (section 2:7). Under this view, an asset acquisition would require an amendment of the articles, for which those same articles usually require a qualified majority. This offers extra protection to minority shareholders disagreeing with the proposed transfer of all assets[46]. The share acquisition is a form of merger in which the acquiring company acquires not the assets but rather the shares of the acquired company. Technically, the share acquisition is not an agreement between two companies; rather it involves numerous agreements between the acquiring company and the selling shareholders. Because it will usually be possible to control a company with 50% plus one of the shares (or even less), the position of the remaining minority shareholders is not a strong one. Therefore, the rules relating to mergers in the Securities Transaction Supervision Decree contain provisions that oblige the acquiring company to make an offer for all outstanding shares, or should the offer not be for all outstanding shares, to limit the stake that the acquirer is allowed to obtain to 30%[47]. More generally speaking, the rules relating to mergers in the Securities Transaction Supervision Decree describe three different forms of

[45] See Van der Heijden-Van der Grinten, no. 165.
[46] See in this respect Van Schilfgaarde, no. 128.
[47] See in this respect Van Schilfgaarde, no. 129. However, Dutch company law does nowhere contain the general obligation to make an offer for all outstanding shares in case a shareholder obtains a certain percentage of the shares.

bids for shares in another company. In section 1 the Decree describes these as the 'fixed offer', the 'partial' offer and the 'tender' offer. In a fixed offer the acquiring company offers a fixed price for all outstanding shares of the target company. Both the partial and the tender offer[48] differ from the fixed offer in the sense that they may not be used to obtain more than 30% of the outstanding shares (sections 9j and 9l). The difference between the partial offer and the tender offer is that the partial offer is a true offer in the sense that it contains the price that the acquiring company is willing to pay. The tender offer is not a true offer but merely an invitation by the acquiring company to the shareholders of the target company to offer their shares for a price they themselves may determine.

As a rule, both boards of directors prepare a merger proposal and submit this to the general meeting of shareholders for approval. Section 2:330 then states that should less than 1/2 of the issued capital be represented at the meeting, the proposed merger resolution requires the approval of 2/3 of the votes issued. Section 2:331 subsection 1 makes an exception to the rule that a 2/3 majority is required for a merger proposal by stating that, unless the articles provide otherwise, a transferee company may resolve to merge by a resolution of its board of directors (see further no. 22).

Section 2:334ee

Analogous to the legal merger, in the case of a legal division of a company, a resolution to divide an NV or a BV requires 2/3 of the votes cast should less than half of the issued capital be represented at the general meeting of shareholders. Also analogous to the legal merger, section 334ff states that a transferee company may resolve upon the division by resolution of its board of directors.

30. 1/3 of the votes cast (blocking power when the minority group possesses more than 2/3 of the votes cast).

Section 2:243(133) subsection 2

It seems strange to discuss a provision that requires 2/3 of the votes cast and also represents at least 50% of the issued capital as a right belonging to a minority. However, if we define minority in a broad sense, not only with regard to percentages of the capital, but also with regard to the controlling position in the company (see no. 5), this right can be seen as a minority right. The articles may contain a provision that states that the appointment of a director by the general meeting of shareholders shall be made from a list of candidates containing the names of at least two candidates for each vacancy. The articles may grant this binding right of nomination to everyone.

[48] Note the different meaning of the Dutch tender offer compared with the American and English

Subsection 2 then states that the general meeting may resolve by a resolution passed by a 2/3 majority representing more than half of the votes that such a nomination list shall not be binding.

31. Analysis of the above mentioned thresholds. As with the positive rights described in nos. 20-25, we can observe several thresholds before a minority shareholder obtains the negative right to block a decision desired by the majority. However, because the exercise of the aforementioned negative right is made dependent on the size of the stake of the majority, it is unnecessary for minority shareholders to combine their holdings before being able to exercise their rights. Analogous to the positive minority rights, the allocation of negative minority rights either on an individual or on an aggregate level is not elaborately thought-out and seems to be more or less random.

It is interesting to note that Dutch company law does not prescribe any qualified majorities for two important decisions within a company. These are the amendment of the articles (section 2:231(121)) and the winding up of the company (sections 2:19-21). However, in practice, many articles of association contain provisions that prescribe a qualified majority for amendment of certain, or in some cases all, sections of the articles. With regard to the amendment of the articles, section 2:231(121) subsection 2 lists a special provision when a provision of the articles restricts amendment of certain sections of the articles. Restriction in this subsection refers to the situation in which the amendment is made dependent on proposal or approval of another body of the company. This restricting provision in the articles itself can also only be amended observing the same restrictions.

A company can be wound up in several ways and on several grounds. Sections 2:19-21 give a more detailed arrangement. Relevant is section 2:19 subsection 1 sub a which states that a company shall be wound up by resolution of the general meeting of shareholders, meaning that, on the basis of the aforementioned section 2:230(120), a simple majority suffices. It is permitted for the articles to limit this power of the general meeting by requiring a qualified majority or by making the exercise of the power by the general meeting dependent on a proposal by another company body. However, it is not possible to fully exclude this power from the general meeting of shareholders in the articles.

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context. In those countries, tender offer usually means a public offer to acquire all outstanding shares.

II.3 Access to the shareholders meeting[49]

32. Registered and bearer shares. The NV allows two different types of shares: registered shares and bearer shares. With regard to this subject, section 2:82 subsection 1 states that the articles shall provide whether the shares shall be in registered or in bearer form. When in bearer form, the proof of entitlement to the share is embodied in the certificate that the company issues for the bearer share. For registered shares, the proof of entitlement is different for registered shares for which certificates have been issued and for those for which this has not been done. A certificate for a registered share is also proof of entitlement to the corresponding share. Should no certificate have been issued, an extract from the so-called shareholders' register (see below) can help to prove entitlement to the shares. However, in a strictly legal sense, this extract does not prove anything more than that one is *registered* as a shareholder. It is then up to the court to decide on the value as evidence of the register itself. Better proof of entitlement to a registered share for which no certificate has been issued can be found in the notarial deed that provided the shareholder his right to the share, either the deed of incorporation, the deed of issue or the deed of transfer.

33. Proof of shareholdership. The articles of association of an NV may provide that prior to a meeting, the shareholders must lodge documentary evidence of their rights. If the articles of association contain such a provision, the notice convening the general meeting of shareholders will state the place where and the day on which this formality must take place at the latest. The institution where the documentary evidence must be lodged is often situated with the principal banker of the company. The day on which deposit of evidence of the shareholder's ownership must take place may not be set earlier than the seventh day prior to the date of the general meeting of shareholders (section 2:117 subsection 3).

The corresponding proceedings for the BV differ in certain respects from that for the NV. Because the BV only has registered shares, it is unnecessary to demand the deposit of the shares before a general meeting. Section 2:175 subsection 1 states that no share certificates shall be issued (section 2:202 even forbids the issue of bearer depository receipts) and that the

[49] Part of this section has previously been published as a chapter (by L. Timmerman) in *Shareholder voting rights and practices in Europe and the United States*, T. Baums and E. Wymeersch (eds.), Kluwer Law International, 1999, p. 219-220.

shares are not freely transferable. Elaborating on this, section 2:195 subsection 2 contains the obligation to incorporate so-called 'restrictions on transfer' in the articles (section 2:87 states that the articles of the NV *may* contain restrictions on transfer, but only with regard to the registered shares). These restrictions on transfer can take either of the following two forms, or a combination of both. They can either prescribe that the shareholder shall require the approval for a transfer of a corporate body designated by the articles, or oblige the shareholder to first offer his shares to his co-shareholders. For the BV, section 2:194 contains the obligation that the board of directors keep a so-called shareholders' register. This means that, in principle, all shareholders are known to the company, the reason why it is considered unnecessary to demand the deposit of shares before a general meeting. However, section 2:227 states that the articles may provide that the shareholder notifies the board of directors of the company of his intention to attend as a requirement for the attendance at the general meeting of shareholders. In this case the convening notice to the meeting shall notice the last day on which such notification shall be made. The day may not be set any earlier than the third day prior to that of the meeting.

Because most of the shares in Dutch-listed companies are kept in 'giro' custody, a shareholder will usually present a certificate issued by the Central Securities Depositary (in Dutch: Necigef) to the bank proving his rights as holder of a certain number of shares in the company. After the deposit of the certificate, the shareholders receive an attendance card for the general meeting of shareholders. Pending the general meeting, the Central Securities Depositary blocks any transfer of the shares deposited. However, deposited shares can be traded on the Euronext Exchange. Under Dutch law, the sale of a share does not imply a transfer of the said share but only creates an obligation to transfer it. Therefore, a sale of the share between the date of deposit and the day of the general meeting of shareholders does not lead to loss of the voting right on the share.

34. Proxy voting. Section 2:117 subsection 1 states that each shareholder has the right to be represented at the general meeting of shareholders by a person holding a written proxy and that this representative has the right to address the meeting and to exercise his voting right. Recently, a new section 2:119 has been included in Book 2 to further facilitate the so-called 'proxy solicitation'. Section 2:119 enables shares that have been registered on a certain date before the general meeting of shareholders, no earlier than seven days prior to the day of the meeting, to continue to possess voting rights, even if the shares are transferred between this registration date and the day of the general meeting. The main difference with the 'old' system is that it is now not only possible to sell a share between the date of deposit and the day of the general meeting, but that the share can also be transferred. However, this transfer of the share does not imply a transfer of the right to vote at the general meeting of shareholders, since that

is dependent on the situation on the registration day. For a small period of time therefore, ownership and voting power can be in different hands.

Section 2:119 subsection 1 states that, when convening the general meeting, the general meeting of shareholders can transfer the power to decide that the voting rights will be exercised by the shareholders who have registered at the chosen date to the board of directors. This transfer is limited to a period of five years, unless regulated in the articles, in which case the transfer can be for an indefinite period of time. The new section 2:119 was intended to increase the use made of proxy solicitation. For this purpose, 11 companies listed on the Amsterdam Exchange, together with the AEX and a number of banks, founded the 'Communicatiekanaal aandeelhouders' (Communication channel shareholders), intended to improve communications between the company and its shareholders, between shareholders themselves, and to increase the participation of shareholders in the decision-making during the general meeting. This Communication channel, together with the new section 2:119, should help to increase the use made of proxy solicitation by active shareholders and by the company itself. This can be seen as a translation of recommendation 32 of the Peters Committee, which stated that a proxy solicitation system that can enhance the involvement of the investors in the decision-making in the general meeting of shareholders should be introduced.

III Role of the organs and officers of the company in relation to minority shareholders

III.1 Duties of the board of directors and the supervisory board

35. Duties of the board of directors and the supervisory board. Under Dutch company law the board of directors must protect the interests of the company. These interests include the continued growth and existence of the company, the interests of shareholders, both minority and otherwise, employees and creditors. These guidelines also apply to the duties of the members of the supervisory board. As already indicated in no. 2, the interests of shareholders, as stakeholders of the company, have been paid more attention as a result of a new emphasis on the concept of shareholder value than traditionally was the case under Dutch company law. This development does not alter the fact that under Dutch company law the interests of other stakeholders than shareholders may prevail over shareholders' interests. Some decisions by the Enterprise Section of the Amsterdam Court of Appeal underline that the board of directors have to take the interests of minority shareholders into consideration in situations where the interests of these shareholders are at stake. Dutch company law does not contain a standard similar to the business judgement rule. However, Dutch courts are not inclined to judge management with the benefit of hindsight. Actions

that could reasonably have been taken by a diligent and informed board member will not be attacked by courts.

III.2 Controlling shareholders

36. Duties of a controlling shareholder. On the basis of the principles of reasonableness and fairness incorporated in section 2:8, a controlling shareholder has to take into consideration the interests of his fellow minority shareholders in taking decisions which affect the interests of minority shareholders.

III.3 Auditors

37. Auditors. Dutch company law has several proceedings in which auditors play a role. Under Dutch law, an auditor is a person independent of the company,in the sense that he is not part of its organisation by virtue of the law or the articles. This does not mean that there is no legal relationship between the company and the auditor. In many cases, this relationship is present, usually in the form of a contract. The auditor is required to perform a certain task in relation to the company by law or by legal decision. It is this independent position in particular, coupled with his lack of interest in the outcome of the proceeding, that makes the auditor an institution capable of protecting minority rights. However, it should be emphasised that the auditor under Dutch law is not a watchdog specially charged with the protection of the minority investors. In this section we will draw a distinction between two categories of auditors. In the first category are the so-called registered accountants (RA) and the accounting consultants (AA). The second category contains the auditor that Dutch law describes as the ‘deskundige’ (expert); possibly, but not necessarily, an RA. In this section we will briefly describe six proceedings in which auditors play a role and indicate the extent to which their role serves to protect the interests of minority shareholders. The general meeting of shareholders appoints the auditor. Only if the general meeting fails to appoint an auditor does the supervisory board or the board of directors have the power to appoint the auditor.

38. The annual accounts (task for RA). Section 2:210(101) subsection 3 states that the general meeting of shareholders will adopt the annual accounts unless the company falls under the rules applicable to statutory two-tier entities. In that case, the

supervisory board will adopt the annual accounts but it still requires the approval of the general meeting of shareholders. On the basis of section 2:393 subsection 1, the company shall issue instructions for the audit of the annual accounts to an accountant. The accountant then reports to the board of directors and the supervisory board on his audit and, more importantly, presents the results of his audit in a report, indicating whether the annual accounts give a true and fair view. Section 2:393 subsection 6 then states that the annual accounts may not be adopted or approved if the constituent or corporate body empowered to do so has been unable to take cognisance of the accountant's report.

The question now is to what extent this audit and the subsequent report protect the interests of the minority shareholders. The answer to this question is related to the task that the law sets for the accountant. Section 2:393 subsection 3 defines this task as

1. examining whether the annual accounts provide such a view as enables a sound judgement to be formed on the assets and liabilities and results of the legal person and, in so far as the nature of the annual accounts permit, of its solvency and liquidity, 2. ascertaining whether the annual accounts satisfy the requirements set by and pursuant to the law, 3. ascertaining whether the annual report has, so far as he can judge, been prepared in accordance with Part 9 of Book 2 and is consistent with the annual accounts, 4. ascertaining whether the information required by subparagraphs b to g inclusive of section 2:392, subsection 1, has been added.

Generally, the view is that the annual accounts and the annual report primarily allow the company to justify its financial and economical policy towards the shareholders[50]. In the event of a proceedings based on section 999-1002 Code of Civil Procedure (see no. 21), it is standing case law that the Enterprise Section leaves a certain margin of appreciation for the board of directors with regard to a certain item in the annual accounts. The exact scope of the margin of appreciation is thought to be dependent on the character of the item in question[51]. The question in the proceedings is 'whether the company can reasonably justify the item in the way that it has done'[52]. It is therefore

[50] See Van Schilfgaarde, no. 99 ('These documents are primarily meant for the shareholders').
[51] See Van der Heijden-Van der Grinten, no. 330.1 ('The extension of the margin of appreciation is dependent upon the character of the item').
[52] See Nijhuis v. Machinefabriek Nijhuis BV, HR 22 February 1989, NJ 1991, 183.

up to the minority shareholder to prove that in the valuation of a certain item, the company has crossed the margins of appreciation[53].

This marginal approach has also to be the guideline in the accountant's report; respect for the board of directors' margin of appreciation is paramount[54]. Another important principle that has arisen from the decisions of the Enterprise Section and the Supreme Court is that the proceedings of section 999-1002 Civil Code of Procedure are not meant to establish whether a claim or an obligation in relation to a third party exists in reality[55]. This means that a minority shareholder cannot bring the lawfulness of a transaction up for discussion within the framework of the proceedings under sections 999-1002. In our opinion, this also means that the accountant is bound by the information that the company provides; his control does not extend to the legal reality of claims and obligations. We may conclude that Dutch legislation concerning the annual accounts and report does not offer a great deal of protection to shareholders in general, and even less protection specifically aimed at minority shareholders.

39. Non-cash contribution on shares and Nachgründung (task for RA). Sections 2:204a(94a) and 204b(94b) state that in the case of a non-cash contribution, an accountant must on principle issue a certificate stating that the value of the contribution to be made, established by means of generally acceptable valuation methods, at least equals the amount payable as a capital contribution in currency. Section 2:204c(94c) regulates transactions between incorporators or shareholders and the company. It states that a legal act by the company may be declared null and void on behalf of the company if it has the purpose of acquiring property,including receivables, which are off-set, from an incorporator or a shareholder, unless the general meeting of shareholders has approved and an accountant has issued a certificate stating that the value of the property to be acquired, applying generally acceptable valuation methods, is at least equal to the value of the consideration[56].

[53] See in the same respect Maeijer, who comments on the decision mentioned in the previous footnote ('In a procedure concerning the annual account, it is up to the affected party to prove that the company has gone beyond its margin of appreciation').
[54] See Asser-Maeijer, 2-III, nos. 426 and 446 ('He (*the accountant*) also has to respect the aforementioned margin of appreciation that in principle belongs to the board of directors').
[55] See Bekker v. Sekisui Systeembouw NV, OK 14 April 1977, NJ 1978, 441 and Voedingsbond-NVV v. Homburg BV, OK 14 April 1977, NJ 1978, 442.
[56] This Nachgründung rule has limitations of time. The property that the company aims to acquire must have belonged to an incorporator one year before the incorporation or thereafter and the legal action aimed at acquiring the property must have been performed before the expiry of two years after the registration of the company in the Commercial Register.

Section 2:204c(94c) may be regarded as the logical complement to section 2:204a(94a); otherwise it would be possible for an incorporator or large shareholder to make a cash contribution on his shares on the one hand, but on the other to engage in a transaction with the company to provide goods for a higher than reasonably justified price. This would lead to the same result as a non-cash contribution that did not represent the fair value to be contributed on the shares.

Both non-cash contribution and Nachgründung should be regarded in the light of the capital protection requirements and are therefore mainly aimed at protecting the rights of creditors. However, it is not hard to imagine that both regulations indirectly protect minority shareholders too. If a large shareholder was allowed to pay up with a non-cash contribution that does not represent the full and fair value of the obligation to pay, the minority shareholder would be disadvantaged. The large shareholder would then have attained a position in the company with regard to dividends, decision-making power, liquidation position etc., without paying the same price per share as the minority shareholder, thereby expropriating wealth from him. The same thought is applicable to the institution of Nachgründung, for if a large shareholder is allowed to sell a property to the company at a price that does not represent the fair value but is too high, this would disadvantage the company and thereby also the shareholders. However, the large shareholder would find this disadvantage at the level of his shareholding more than compensated for by the profit he would make from selling the property to the company in private, a benefit that the minority shareholder does not have.

The last question with regard to non-cash contribution and Nachgründung is how can minority shareholders effectuate their rights should the legal protective provisions not be applied. Not complying with the rules concerning non-cash contribution on incorporation would mean that the court could wind up the company because of defects in its formation[57] (section 2:21 subsection 1 sub a); a minority shareholder can request the court to do so since he qualifies as a concerned person (section 2:21 subsection 4). The law does not state what the consequences are should the rules concerning the non-cash contribution later than on incorporation not be applied. The most likely and logical consequence from the point of view of the minority

[57] In the same way Van der Heijden-Van der Grinten, no. 168.3 ('We would assume that in that case one can speak of a defect in its formation, which means that the company can be wound up').

shareholders seems to be that the issue of the shares is null and void and that those who have made the non-cash contribution without complying with the relevant rules have therefore *ab initio* not become shareholders.

40. Merger proposal (task for RA), price determination for the buying out proceedings (task for expert) and price determinationfor a settlement of dispute (task for expert). We will treat these three subjects together because, as we will see, all three have important characteristics in common. In the case of a merger proposal between two companies, section 2:328 describes the role the accountant plays. His main task is to certify whether in his opinion the proposed share exchange ratio is reasonable. He must also certify that the sum of the shareholders' equity of each company ceasing to exist on the basis of generally accepted valuation methods at least corresponds to the nominal paid-up amount on the aggregate shares to be acquired by their shareholders under the merger, increased with the cash payments to which they are entitled according to the exchange ratio. Moreover, he must also prepare a report which includes his opinion on the matters mentioned in section 2:327, among other things, whether the method(s) used to determine the share exchange ratio are appropriate in the particular instance, and whether there have been any particular difficulties with the valuation and the determination of the share exchange ratio. These provisions do not explicitly protect the interests of minority shareholders. These provisions are especially relevant for minority protection if a majority shareholder wants to merge the company with a company in which he also holds a majority of the shares.

There is also a task for an individual expert in the situation of price determination for buying out proceedings (section 2:201a(92a)) or price determination for a settlement of dispute (section 2:336),. There are significant differences with the merger proceedings, however. First, the expert(s) in both the aforementioned proceedings are not necessarily registered accountants; they can be anyone that the court finds suitable to act as an expert. Second, for buying out proceedings, the appointment of one or more experts is not mandatory (section 2:201a(92a)) and it is the court that determines the price, which is also the case for the settlement of a dispute.

The view behind the fact that the appointment of experts is not mandatory for buying out proceedings is probably that in many cases in which the buying out proceedings are taking place, the remaining shareholders are those who are unwilling, or have simply forgotten, to

offer their shares to the acquiring company. Under normal circumstances, the court can then simply determine the price at the same level as the price for the shareholders who accepted the bid received for their shares.

The third, and perhaps most striking difference, is the fact that in the merger proceedings it is hard to obtain a judicial decision about the fairness of the valuation of the company, and thereby of the price the shareholders receive.

In the merger proceedings, the role of the court is minimal. It is the notary who plays a more important role, but his role is different from that of a judge. His task is described in section 2:318 and is mainly procedural in nature. The notary specifically does not judge the fairness of the price as established by the accountant; his only task is to make sure that there has been an accountant's certification of the reasonableness of the exchange ratio.

Nullification of a merger.

The law only states that it is mandatory for an accountant to report on the reasonableness of the share exchange ratio, but provides no direct solution should certain shareholders not agree with the accountant's conclusion that the valuation is fair. Two possible remedies come to mind. First, the minority shareholder who disagrees with the price he has received based on the fairness opinion of the accountant can ask the court to declare the merger void. This option is set out in section 2:323. As this section states, the declaration by a court that the merger is void is limited to the grounds mentioned in subsection 1. One of the grounds (subsection 1 sub c) on which a merger may be declared void is that there is a ground by which the resolution by the general meeting of shareholders required for the merger may be nullified. Thus, a minority shareholder who has initiated proceedings to get the merger declared void should in those same proceedings also request the nullification of the resolution by the general meeting that was required for the merger[58].

Theoretically, the proceedings described above could indeed lead to a declaration that the merger is void. Its practical use, however, is very limited. First of all, the proceedings are long, complex and expensive for a minority shareholder to engage in. Second, and probably even more problematic, is that the dissatisfied minority shareholder will have to show to a certain extent that the general meeting of shareholders acted contrary to the principles of reasonableness and fairness against him by accepting the valuation of the accountant. That means that he will not only have to 'prove' that the majority of the other shareholders were wrong to accept this bid, he will also have to 'prove' on economic grounds that the price is unfair. In practice, these hurdles will in most cases prove to be too high.

[58] See Van der Heijden-Van der Grinten, no. 414 ('If one demands that a merger shall be declared void on the grounds that the underlying resolution of the general meeting should be nullified, one must also demand nullification of this resolution').

Even when the court rules that thereare grounds on which the merger can be declared void, there is no obligation to do so. Section 2:323 subsection 4 states that the merger shall not be avoided if the legal person has cured the default or if the consequences of a merger, which have already taken effect, can only be undone with difficulty. It is not hard to imagine that this second ground will frequently be applicable, because a legal proceedings determining that there are a grounds for avoidance will take some time. During this period the new entity will have engaged in many new relationships with third parties, which are usually difficult to unwind. However, section 2:323 subsection 5 states that should there be grounds for avoidance, but the court has chosen not to avoid the merger, it may order the company to compensate any loss incurred by a party claiming avoidance of the merger.

An inquiry into an unreasonable price.

Because of the aforementioned obstacles for a minority shareholder in the avoidance proceedings (section 2:323) and the uncertainty with regard to the outcome, even if there are grounds for avoidance, a second option might be preferable. Recently, the president of the Enterprise Section has indicated[59] that the court is not unwilling to consider the option that, under certain circumstances, a minority shareholder may object to the acceptance of a bid that is, in his view, too low, in an inquiry proceedings on the grounds that the way in which the company has acted means that there are well-founded reasons to doubt the correctness of the policy. This same reasoning can also be applied to a situation in which the minority shareholder considers the exchange rate in merger proceedings to be too low.

In 1999, the Enterprise Section had to decide in two cases in which the minority shareholders argued that the price offered for their shares did not represent the fair value of the company[60]. However, both cases were buying out proceedings and not inquiry proceedings. Nevertheless, inquiry proceedings on the grounds that the offer is too low are not completely unimaginable. Anticipating this, we foresee the following problems. First, in order to qualify for the right to file an application to start inquiry proceedings, the filing shareholders need to represent at least 10% of the issued capital. This could cause problems, since in many public offers the acquiring company makes the continuation of its offer dependent on the condition that at least 95% of the shareholders have offered their shares. In these circumstances, the remaining shareholders in the acquired company together never qualify to demand an inquiry proceedings. What the remaining shareholders need to do, then, is to convince the shareholders who have sold their shares that the price they received was unfair and too low. These shareholders can then ask the court to nullify the contract that they entered into with

[59] See J.H.M. Willems, *De enquêteprocedure: een efficiënte dienstmaagd (The inquiry procedure: an efficient servant)*, in*: Conflicten rondom de rechtspersoon (Conflicts around the legal person)*, Kluwer Deventer, 2000, p. 29-45.

[60] The buying out procedure MoGen International NV, OK 16 September 1999, JOR 1999, 246 and the buying out procedure Pirelli Tyre Holding NV, OK 24 June 1999, NJ 1999, 724.

the acquiring company on the grounds that the contract was entered into under the influence of error (section 6:228). The error would lie in the fact that the acquiring company gave a false view of affairs with regard to the price and the circumstances of the bid.

Assuming that the disgruntled shareholders pass this first hurdle, more difficulties arise. Before an inquiry can be ordered, they have show that there are well-founded reasons to doubt the correctness of the policy of the company. Since the inquiry proceedings are not limited to actions by the board of directors or the supervisory board, but extend to other organs as well, we distinguish between two options. First, and most likely, the demanding shareholders argue that the way in which the board of directors behaved with regard to the offer leads to the conclusion that there are well-founded reasons to doubt the correctness of the policy. Circumstances that could support the assumption that there are reasons to doubt the correctness of the policy include the fact that the board agreed to a price that is evidently too low, the fact that the board refused to provide adequate information on the underlying rationale of the offer, and the fact that the board failed to initiate talks with other parties to examine whether a higher bid was possible. Second, reasons to doubt the correctness of the policy could also lie in the behaviour of the general meeting of shareholders[61]. However, we find it hard to imagine how a decision by shareholders to accept a certain offer could possibly qualify as 'reasons to doubt the correctness of the policy'.

Conclusion

To sum up, we can say that all three proceedings (rules regarding the merger proposal, buying out, settlement of disputes) aim to protect the interests of the shareholders but that the buying out proceedings and the rules regarding the settlement of disputes offer more specific and better protection for minority shareholders, helped by the fact that the court plays a more significant role in these proceedings. It is strange that the law contains no easy remedy for shareholders who disagree with a fairness opinion by an accountant on the price for their shares to question the legality of a proposed merger.

IV Special rights protecting minority shareholders

IV.1 The principle of equality

41. Relation to reasonableness and fairness. The relevant section of Dutch company law with regard to the principle of equality (2:201(92) subsection 2) is a direct result of the EC's second company law directive[62]. This directive is limited to subjects related to capital protection and is also only applicable to public companies. This

[61] See for example OK 22 January 1976, NJ 1977, 341, HR 10 January 1990, NJ 1990, 466 and HR 9 July 1990, NJ 1991, 51. However, inquiries have usually been ordered on the grounds that the company's policy had become paralysed due to a deadlock in the general meeting of shareholders. See Maeijer's comment under HR 9 July 1990, NJ 1991, 51.

[62] It is based on section 42 of the directive of the European Council, 13 December 1976, Pb L 26/1, 31 January 1977.

means that the Dutch legislator is under no obligation to extend the range of the principle of equality beyond the subject of capital protection[63]. Examining the Dutch text however, it gives no indication that its scope is limited to capital protection issues, while section 2:201 subsection 2 explicitly states that the principle of equality is also applicable to BVs. The conclusion that section 2:201(92) subsection 2 is not limited to capital protection becomes even stronger when we examine the Memorandum of Reply[64]. It states explicitly that the principle of equality extends beyond issues of capital protection. Strangely enough, the minister also remarks that he finds it hard to imagine a situation in which the obligation for a company to treat its shareholders equally plays a role outside the issues of capital protection, and that he finds it equally hard to imagine that the principles of reasonableness and fairness require a divergence from the principle of equality.

On the basis of the aforementioned, we can therefore conclude that the principle of equality of shareholders currently applies not only to issues concerning capital protection but to all company law issues.

Two important rules following on from the principle of equality as defined in section 2:201(92) can be found in sections 2:206a(96a) and 208(99). These sections indicate that, in principle, existing shareholders have a pre-emption right on any issue of shares *pro rata* to the aggregate amount of their shares. Section 2:206a(96a) subsection 6 states that the general meeting of shareholders can decide to pass off the pre-emption right. Nevertheless, the principle of equality overrides such a decision[65]. Section 2:208(99) subsection 4 states that a partial repayment on shares or a release from the obligation to pay up must be made *pro rata* to all the shares unless, in respect of the issue of a certain class of shares, the articles provide that a repayment may be made or a release may be given exclusively in respect of such shares.

As we emphasised earlier (see no. 12), the principle of equality is of the utmost importance for the protection of minority shareholders. The Dutch Supreme Court does not regard section 2:201(92) subsection 2 as a provision from which no departure is allowed. It interprets the rule of section 2:201(92) flexibly. First of all, it

[63] See also Vletter-van Dort, p. 15 ('The member states were certainly under no obligation to include a general duty to treat shareholders equally in their company law') who bases her opinion on J.H. Maschhaupt and P.M. Storm, *De tweede EEG-richtlijn inzake vennootschapsrecht (The EEC's second directive regarding company law)*, Preadviezen voor de Vereeniging Handelsrecht 1978, Zwolle 1980, p. 243.

[64] See Memorandum of Reply, TK 1978-1979, no. 15 304, no. 3, p. 18 ('the treatment of shareholders with regard to the subjects of the second directive and moreover every other form of treatment of the shareholders by the company').

[65] See again the case of Van den Berge v. Verenigde Bootlieden, HR 31 December 1993, NJ 1994, 436 ('… section 2:201 subsection 2 contains a mandatory provision and is not overridden by the provision of section 2:206a').

is important to realise that, as Van Schilfgaarde mentions[66], the equality defined in subsection 2 is not an absolute equality but rather a relative one; equality in proportion to the amount of capital the shareholder in question provides.

However, the exact content of the principle of equality is in our opinion dependent on the nature of the subject in question. With regard to certain rights, for example, the right to vote in a general meeting of shareholders and the right to receive a dividend, equality is indeed relative; there it is proportional to the number of shares the shareholder holds. With regard to certain other rights however, mainly information related rights, the equality has a different nature; there it is absolute, for under Dutch company law a company is not generally permitted to provide certain (important) information to large shareholders but not to smaller shareholders.

Second, departure from the principle of equality is permitted when shareholders are not in equal circumstances. Finally, departure is also permitted when there is a reasonable and objective justification for the unequal treatment[67]. Here one can recognise the derogatory effect of the principles of reasonableness and fairness.

The relationship between subsection 2 and subsection 1 is intriguing, as subsection 1 opens up the possibility to provide in the articles that the rule that all shares rank *pari passu* in proportion to their amount is not applicable. The Dutch legislator has indicated that in his opinion a provision in the articles as mentioned in subsection 1 can mean that the shareholders are not in equal circumstances, as mentioned in subsection 2[68]. However, we question the opinion that different shareholders can be said to be in different circumstances on the basis of the articles *alone*. The legislator has clearly indicated that in his opinion section 2:92 subsection 2 is nothing more than an elaboration of section 2:8. We are of the opinion that not only is subsection 2 an elaboration of section 2:8, but that subsection 1 and the subsections 1 and 2 together cannot be understood correctly either without paying attention to the influence of reasonableness and fairness. The question, in our opinion, should therefore be 'do the principles of reasonableness and fairness ensure that a different treatment of shareholders solely based on a provision in the articles is reasonably and objectively

[66] See P. van Schilfgaarde in *Corporate governance voor juristen (Corporate governance for lawyers)*, Kluwer Deventer, 1998, p. 19-28. 'Even when there is a principle, it is not the principle of equality, not even the principle of democracy, but the principle of plutocracy…. The equality is a relative one.'
[67] As decided by the Supreme Court in the case Van den Berge v. Verenigde Bootlieden (HR 31 December 1993, NJ 1994, 436). '… the court of appeal has not, when judging the question whether a justification as aforementioned could be found in the special circumstances of the given case, applied an incorrect criterion.'
[68] See the Memorandum of Reply 15 304, no. 6, p. 18.

justified?'. We do not think that, generally speaking, the answer to this question can be in the affirmative.

A further question is whether a company may include provisions in its articles that draw a difference between shareholders who are in equal circumstances, if all the shareholders agree? Would such a provision of inequality also be used against shareholders who do not belong to the group of shareholders which voted in favour of such a provision, but became shareholders later, assuming that the provisions in the articles are sufficiently known to these new shareholders? Would it be allowed to treat shareholders unequally if all of them agreed, even if there is no explicit provision in the articles that allows this? These are all fundamental questions for which Dutch company law, established case law and doctrine[69] hardly provide any answers.

The only case we are aware of on this subject is a decision by the Amsterdam Court of Appeal[70] dated 28 June 1994. In this case the articles determined that the profit was at the disposition of the general meeting of shareholders. The Court decided that the general meeting of shareholders can legally validate the payment of a smaller dividend on the shares of a particular shareholder than on the shares of other shareholders should the shareholder in question agree. We should not forget that this case did not primarily concern company law but rather that it was a case concerning tax law. Annotator Timmerman wrote under this decision that, in his opinion, a general meeting of shareholders cannot legally validate the decision to pay a different dividend on shares of the same type. In our opinion, the following problem arises when one diverges from the principle of equality with regard to dividend payments. Imagine a situation in which the articles do not enable a divergence from the principle of equality with regard to dividend payments; this is not possible based on a statutory provision either, for section 2:201(92) subsection 2 explicitly prescribes equality. Our main objection to inequality with regard to the dividend payments is that both the articles and the statutory provisions are public sources. External parties may take notice of them, decide how to behave on them, and rely on and trust them. This public trust would be damaged if divergence from the principle of equality were to be allowed. In the nineteen-thirties, the Supreme Court already decided that the general meeting of shareholders can only deviate from the articles of association by amending these articles[71]. Of course, this rule of non-divergence is not sacrosanct. We can imagine divergence being possible when there is reasonable and objective justification[72]. However, in our opinion this reasonable and objective justification cannot solely be based on the interests of the shareholders as shareholders. Because the interest harmed when diverging from the principle of equality under these circumstances is public in nature (public trust in the correctness of and obedience to the articles and the law), the reasonable and objective justification needs to be of a similar character. With regard to this, we can imagine that public welfare or the interests of the company as a whole may count as reasonable and objective justification for diverging from the principle of equality with regard to dividend payments, even when the articles and the law do not provide for this. All of this still leaves the possibility that a shareholder can waive his

[69] In chapter 2 of the dissertation by Vletter-van Dort there is an interesting discussion of the principle of equality in company law.
[70] Published and commented on in TVVS 1995, p. 74.
[71] See HR 8 April 1938, NJ 1938, 1076.
[72] Compare the case of Van den Berge v. Verenigde Bootlieden (HR 31 December 1993, NJ 1994, 436).

right to receive a dividend. Such a waiver would be a unilateral legal act by the shareholder which cannot be attributed to the company. This also means that the principle of equality will not object to this.

On the grounds of section 2:201(92) subsection 1, it is undoubtedly possible to determine in the articles that *in certain cases* shares have different rights and obligations attached to them. But, as in all matters concerning company law, the principles of reasonableness and fairness (section 2:8) play a decisive role in the background. From a company law point of view, equality and freedom of contract are not principles that take precedence over the principles of reasonableness and fairness, but can and should be seen either as resulting principles (equality) or principles that may never conflict with the demands of reasonableness and fairness (complementary therefore means freedom of contract). This point of departure means that the following frame of reference could in our opinion be useful when studying these questions.

On the basis of section 2:201(92) subsection 1 *alone*, it is impossible to legally validate divergence in the articles from the principle of equality as described in subsection 2. However, a divergence in the articles is possible when the law explicitly states elsewhere that divergence from the principle of equality in the articles is allowed *with regard to a specific subject*. By restating the principle from section 2:201(92) subsection 1 and limiting the opportunity for divergence to a specific subject, the legislator has made it clear that it has *in abstracto* made the trade-off between the principles of equality and that of freedom of contract – the principles of reasonableness and fairness do not oppose an unequal treatment of shareholders with regard to this specific subject. One example of this approach in our opinion is section 2:99 subsection 4 (the articles may provide for a partial repayment on the shares or a release from the obligation to pay up may be given exclusively in respect to a certain class of shares).

What happens if the articles contain a provision with regard to a specific subject that diverges from the principle of equality but this diverging provision has no other basis in the law than section 2:201(92) subsection 1? As mentioned above, in our opinion the point of departure should be that, in general, the principles of reasonableness and fairness speak against this diverging provision in the articles. However, since it concerns a weighing-up of the interests *in concreto*, circumstances may lead to the conclusion that divergence in the articles solely based on section 2:201(92) subsection 1 must be considered legally valid. In this the fact that none of the parties concerned with the company (which group may be larger than the shareholders alone, since the interests of the company as an entity of its own should sometimes also be taken into account) object to the unequal treatment of the shareholders could play a role. This general approval means that a divergence from the principle of equality in the articles solely based on section 2:201(92) subsection 1 is less quickly in conflict with reasonableness and fairness. Another reason why divergence in the articles from the principle of equality solely based on section 201(92) subsection 1 could be considered legally valid is that such divergence has been long-term practice in Dutch company law, as for example the practice of so-called priority shares.

42. Relation of the principle of equality to securities law. There are certain subjects with regard to which it is impossible to legally validate divergence from the principle of equality through a provision in the articles. This impossibility exists mainly with regard to subjects like transparency, predictability, information disclosure, etc. For these subjects, the distinction between listed and unlisted companies is relevant. The aforementioned subjects are mainly important for listed companies, and also for the shareholders of these types of companies, who in general do not know each other and therefore find no protection in the private character of the company. Provisions in the articles cannot be applied for these kind of companies with regard to divergence from the principle of equality on subjects like transparency, predictability and information disclosure. An unequal treatment of shareholders with regard to these subjects may violate the legislative provisions of securities law. Examples include section 28h of the Listing and Issuing Rules and section 46a of Securities Transaction Supervision Act 1995. One may go so far as to say that in securities law the principle of equality plays a more important role than it does in company law.

43. Selective distribution of information. Closely related to the principle of equality in securities law is the issue of selective distribution of information. Eisma describes selective contacts as 'contacts between the board of directors of a listed NV and one or more, but not all shareholders, especially institutional investors outside the formal general meeting of shareholders[73]'.

These selective contacts can be between certain shareholders and the company directly, but also between the company and financial analysts, who first report to their clients and only publish their report thereafter. Eisma notes that in his opinion institutional investors are increasingly demanding these selective contacts and that companies are willing to fulfil these demands, probably even to a greater extent than can be derived from publicly available information.

It is not hard to imagine that during these selective contacts the company provides certain shareholders with information that is not yet available in that form to the other shareholders: so-called selective disclosure of information. Dutch law, doctrine and established case law contain no specific answer to the question of whether these selective contacts are allowed. However, two provisions contain rules that affect the answer to this decision. The first is section 46a of the Securities Transaction Supervision Act 1995. This section forbids the disclosure of inside information to

[73] See Eisma, *Investor relations*, inaugural address, 1998, p.1, hereafter referred to as Eisma.

third parties, unless in the normal exercise of one's job, profession or function. This means that the structural disclosure of inside information as part of an investor relations policy is not allowed, since that cannot be considered as being part of the board's normal job, profession or function[74].

This is no different when the board provides certain shareholders with inside information under the condition that the inside information is not further distributed to others and that the receiving shareholders abstain from trading in the securities of the company. However, it is conceivable that this selective distribution of information is in the best interests of the company, since certain shareholders may make their shareholding dependent on the receipt of inside information. We then witness a tension between the principle of equality, which prevents selective information distribution, and the board's duty to act in the best interests of the company.

The second relevant 'rule' is the principle of equality, which can in Dutch company law be found in the aforementioned section 2:201(92) subsection 2 and in section 26 of the Listing and Issuing Rules. Both sections put an obligation on the company to treat shareholders who are in equal circumstances in an equal manner. In our opinion one cannot base the conclusion that certain shareholders are not in equal circumstances solely on the fact that one shareholder holds more shares than another, since for both categories of shareholders, receiving adequate information is relevant[75]. This means that in general the principle of equality prevents selective contacts and selective disclosure of information. However, existing case law[76] states that departure from the principle of equality is allowed if there is a reasonable and objective justification for this departure. Therefore, generally speaking, the principle of equality prevents selective contacts and disclosure because institutional investors and other[77] large shareholders are in equal circumstances, but one has to determine on a case-to-case basis whether departure from the principle of equality is allowed in this situation because there is reasonable and objective justification.

One could argue that selective contacts and disclosure are under certain circumstances in the best interests of the company and that it is therefore compatible with the duty of the board of directors to engage in these selective contacts and disclosure[78]. The reasoning behind this is that certain large shareholders make their shareholding dependent on the fact that they belong to the group of shareholders with which the company has selective contacts. If the company

[74] See Eisma, p. 22-23.
[75] Both Eisma (p. 23-29) en Vletter-van Dort (p. 125) hold the same opinion.
[76] See Van den Berge v. Verenigde Bootlieden, HR 31 December 1993, NJ 1994, 436.
[77] The question whether institutional investors may be regarded as large shareholders remains because they typically hold no more than 5% in the company.
[78] Section 2:250(140) subsection 2 states explicitly that, in the performance of its duties, the supervisory board shall be guided by the interests of the company and the enterprise connected therewith. It is generally thought that the board of directors should also act according to this norm.

did not engage in selective contacts, demand for its shares would reduce, thereby increasing the cost of capital for the company. Not only is this not beneficial for the company itself, it is also harmful to the other shareholders.

The conclusion may be that in general, the principle of equality prevents selective contacts but that under certain circumstances a reasonable and objective justification may be found for a specific selective contact. However, section 46a of the Securities Transaction Supervision Act 1995 then prevents inside information being revealed in this selective contact.

IV.2 Information rights

44. Information provided spontaneously and on request. In this section we will give an overview of the main information rights for minority shareholders. We will draw a distinction between information provided spontaneously[79] and information provided on request.

45. Information provided spontaneously. We will first present an overview of the provisions that contain an obligation for the company to provide information to (minority) shareholders.

Book 2 contains several provisions that oblige the company to provide information to shareholders on several occasions. Below we will list the most important ones and include a short description of the relevant provisions.

Section 2:206(96) and 2:206a(96a)

When a company intends to increase its capital, it has to bear in mind that, in general, there is a pre-emption right for existing shareholders for both the BV and the NV. For shareholders to be able to effectively exercise their pre-emption rights, they need to have knowledge of the intended capital increase. Section 2:206a(96a) subsection 4 obliges the company to notify existing shareholders of the planned capital increase[80]. For the BV this has to be done by sending a notification to each shareholder; for the

[79] By spontaneously we do not mean on request of a shareholder; of course, the information distribution will hardly ever be entirely spontaneous but rather based on a legal or semi-legal obligation.

[80] Subsection 7 of section 2:96a states that for the NV the full text of the resolution to restrict the pre-emption right should be deposited at the Commercial Registry. This allows minority or other shareholders to take notice of the restriction and enables them to decide whether or not to initiate a procedure to seek nullification.

NV this must be done by publishing a notification in the Netherlands Government Gazette and one other daily newspaper with national circulation or, should the NV have only registered shares, by sending a notification to each shareholder. It is clear that this provision protects the rights of minority shareholders. Were they to remain unaware of the planned capital increase, it would be easy for a large shareholder to increase his stake in the company, potentially allowing him to reach certain thresholds, for example, 95% of the issued capital, and thereby harming the existing rights of minority shareholders, who could in the previous example be squeezed out.

More generally, section 2:96 subsections 3 and 4 state that for the NV the company must deposit the full text of the resolution to issue shares and the number and class of shares, once issued, at the Commercial Registry. These subsections can also be seen as protection of the interests of minority shareholders, for through the deposit they can obtain knowledge of the capital increase. This knowledge allows them to decide whether or not to start proceedings seeking nullification of the resolution to issue shares.

Section 2:208(99)

This section contains provisions that protect minority shareholders in the event of a capital reduction. Contrary to the protection of minority shareholders in the event of a capital increase, which may be characterised as formal in nature, the protection in the event of a capital reduction is mainly material in nature and can be found in section 2:208(99) subsections 2-6. These subsections all have in common that cancellation of minority shareholders' shares or reduction of the nominal amount can only take place if principles like 'provision in the articles', proportionality, approval and qualified majority are taken into account. The only relevant formal protection clause regarding capital reduction is subsection 7. This subsection states that the notice convening the general meeting at which the resolution concerning the capital reduction will be taken should state the object of the reduction and the manner of implementation.

Sections 2:233(123) and 2:236(126)

With regard to the amendment of the articles, Book 2 also contains several sections that protect the interests of minority shareholders through the obligation to disclose certain information. Section 2:233(123) states that if a proposal to amend the articles is to be submitted to the general meeting of shareholders, such should always be stated in the notice convening the meeting. Subsections 2 and 3 allow the shareholders to take notice of the proposed amendment, through the obligation to deposit a copy at the office of the company, and to obtain a copy free of charge.

Section 2:236(126) obliges the members of the board of directors to deposit an officially certified copy of the amendment and the amended version of the articles at the Commercial Registry. These sections again allow the minority shareholder to be aware of the proposed amendment of the articles and therefore allow him to effectuate his right to cast his vote on the matter. Section 2:236(126) allows him, once an amendment has taken place, to take notice of this amendment, thereby enabling him to effectuate his right to demand nullification of the resolution to amend the articles.

Title 7 of Book 2 (mergers and divisions)

Title 7, legal mergers and divisions, contains several sections that protect the interests of minority shareholders through the disclosure of information. With regard to a merger, the most important provisions can be found in sections 2:314 and 318. Section 2:314 states in subsection 1 that each legal person to be merged is obliged to deposit several documents at the Commercial Registry. These include the merger proposal[81], the last three adopted annual accounts and annual reports, including the accountant's certificates and, if necessary, interim statements of assets and liabilities or annual accounts, which have not yet been adopted. Subsection 2 contains a further obligation for the board of directors; the financial data, even that which do not have to be deposited for public inspection at the Commercial Registry, shall be simultaneously deposited at the office of the company. These are open for inspection by all shareholders.

Finally, in the pre-merger stage, subsection 3 contains the obligation for all companies to be merged to announce in a daily newspaper with national circulation that the documents have been deposited according to the provisions in subsection 1 and 2 of section 2:314. Section 2:318 subsection 3 contains a publication duty at a later stage of the merger proceedings. It obliges the transferee legal person to ensure that the merger is registered at the Commercial Registry, where it also has to deposit a copy of the deed of merger with the notarial certificate annexed Finally, section 2:318 subsection 4 contains the obligation for the transferee legal person to notify the keepers of other relevant public registers as well. With regard to the division, sections 2:334h and 334n contain similar provisions for a legal merger.

Just as for capital increase and amendment of the articles, we can also witness disclosure duties at two different stages in merger proceedings and division proceedings. First, before the decision is taken, the aim of disclosure is to try to make sure that all shareholders can exercise their voting rights. Second, once the decision has been taken there is a duty to disclose this decision, making it possible for

[81] Section 2:312 contains a fairly detailed description of the minimum requirements of the merger proposal. These include the intentions with regard to the composition of the board of directors and the supervisory board and the intentions with regard to the continuation or termination of activities.

shareholders who do not agree to decide whether they want to demand that the court nullify the decision.

Other provisions

Two important provisions regarding information disclosure outside Book 2 can be found in section 28h of the Listing and Issuing Rules and in sections 2, 3 and 7 of the Disclosure of Major Holdings in Listed Companies Act 1996.

Section 28h of the Listing and Issuing Rules[82] obliges a company to publish a notification concerning each fact or event related to the company which one must assume will substantially affect the share price as soon as possible. This notification must be made both to the general public and to Euronext Amsterdam (section 28h and 30b Listing and Issuing Rules). Section 28h contains as an exception the situation that Euronext Amsterdam may grant an exemption from the publication duty on the grounds that publication of certain information could harm the rightful interests of the issuing company. Strictly speaking, the Listing and Issuing Rules are only a contract between the issuing company and Euronext Amsterdam, meaning that the shareholders cannot demand in court that the company comply with section 28h[83]. However, a company that does not comply with section 28h may be liable in respect of the shareholders under tort law (section 6:162 Civil Code) for any resulting damage[84].

The Disclosure of Major Holdings in Listed Companies Act 1996 is primarily aimed at protecting a company against a silent hostile take-over attempt and not at protecting minority or other shareholders in that company. Section 1 defines certain bandwidths: 0-5%, 5-10%, 10-25%, 25-50%, 50-66 2/3% and 66 2/3% and above. Section 2 then obliges a person who acquires or disposes of shares or votes such that he falls into a different bandwidth to report this fact immediately to the company and to the Stichting Toezicht Effectenverkeer (STE, Securities Board of the Netherlands). Section 3 obliges any person holding more than 5% of the shares or the votes to report this to the company and to the STE should the NV (to which section 3 is limited) obtain a listing on an exchange in the European Union. Section 7, finally, contains the

[82] This section is the implementation in Dutch law of paragraph 5 sub a scheme C of the EC directive 70/279.
[83] As decided by the Amsterdam District Court 14 January 1998, JOR 1998, 64.
[84] See the judgement of the Amsterdam District Court in the Datex case, 18 April 1990.

obligation that the STE must make the information that the shareholder has provided under section 6 publicly available in each member state of the European Union in which the shares of the company have been admitted to an official exchange. Even though the aforementioned provisions are not primarily aimed at protecting the interests of minority shareholders, they do have that side-effect. Under normal circumstances, it would be difficult for an acquiring company to obtain enough shares in a short period of time on the free market to silently obtain control of the target company without the Disclosure of Major Holdings in Listed Companies Act 1996 hindering them. This also means that minority or other shareholders will be able to keep track of parties who are actively increasing their stake in the company, giving them the opportunity to decide whether or not they want to maintain their shareholding in the company, even when that means that one large shareholder will take control of the company.

46. Information provided on request. Most of the information provided on request will usually be provided during the general meeting of shareholders. With regard to this subject, section 2:217(107) subsection 2 is the most relevant provision.

Section 2:217(107) subsection 2
The board of directors and the supervisory board shall provide all the information it requests to the general meeting, unless this conflicts with a substantial interest of the company.

One problem with section 2:217(107) subsection 2 is that it is uncertain whether the right to receive information is granted only to the general meeting of shareholders as such, or that the right is also granted to every individual shareholder. In the first instance, a request for information would have to be made by the general meeting of shareholders through a resolution, which would require a majority of the shares present to vote in favour. It is clear that in this case, the right to receive information cannot be regarded as a minority right.

However, most writers[85] are currently of the opinion that during a general meeting of shareholders every individual shareholder has the right to ask for information and that in principle the board of directors and the supervisory board have a corresponding obligation to

[85] See on the subject the recent dissertation by Vletter-van Dort, entitled *Gelijke behandeling van beleggers bij informatieverstrekking (Equal treatment of investors in the provision of information)*, Kluwer, Deventer, The Netherlands, 2001, hereafter referred to as Vletter-van Dort.

answer. A related question is whether section 2:217(107) subsection 2 also provides the individual shareholder with the right to receive information outside the context of the general meeting of shareholders. Nearly all Dutch writers answer this question in the negative[86]. However, that does not mean that the board of directors or the supervisory board is never obliged to provide information to a shareholder at his request. Under certain circumstances it can be imagined that not providing information to a shareholder upon request conflicts with section 2:8; the refusal can be unreasonable and unfair[87]. In her dissertation, Vletter-van Dort gives an overview of case law on this subject[88]. Her conclusion is that proceedings based on section 2:8 to receive information have never been successful, but that under certain circumstances a company can be obliged to provide information to an individual shareholder outside the general meeting of shareholders on the grounds of reasonableness and fairness. An interesting question that then arises is whether or not this selective information distribution conflicts with the obligation for the company to treat all shareholders that are in equal circumstances in an equal manner (section 2:201(92) subsection 2).

The scope of the information right of shareholders can only be limited by a substantial interest of the company. In the doctrine there are differing opinions about the extent of the clause 'substantial interests of the company'.

Maeijer states[89] that not answering a question in a general meeting of shareholders should be the exception. He then cites the Memorandum of Reply, which gives several examples of 'substantial interests of the company'. These include the leaking of information which would harm the competitive position of the company[90]. Van der Grinten sees the 'substantial interests of the company' as a somewhat broader concept[91]. He gives the same example as Maeijer (harm to the competitive position), but also mentions 'that legitimate interests of others would be disadvantaged by the distribution of the requested information' as a legitimate reason not to answer a question.

Another important characteristic of the right to receive information is that it is up to the board of directors and the supervisory board to decide whether a certain interest qualifies as a 'substantial interest of the company'. Both Maeijer and Van der Grinten[92] say that it is hard for a shareholder who disagrees with this judgement to effectively question it, since the law gives no specific remedy in this situation.

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[86] These include Van der Grinten (in Van der Heijden-Van der Grinten, no. 203.1), Maeijer in Asser-Maeijer *Vertegenwoordiging en rechtspersoon; De naamloze en de besloten vennootschap (Representation and legal person; The public and the private limited company)*, no. 256, 2nd ed., hereafter referred to as Asser-Maeijer, 2-III) and Slagter in *Compendium van het ondernemingsrecht (Compendium of company law)*, par. 67, 7th ed., hereafter referred to as Slagter.

[87] Both Timmerman, in *De nieuwe bepalingen van boek 2 BW (The new provisions of Book 2 of the Civil Code)*, preadvies van de Vereeniging Handelsrecht, Zwolle, 1991, p. 51, and Van Schilfgaarde, in Van Schilfgaarde, no. 64, have defended this position.

[88] Vletter-van Dort, p. 71-86.

[89] See Asser-Maeijer, 2-III, no. 256.

[90] See also the President of the District Court Den Bosch, 5 August 1999, JOR 1999, 202.

[91] See Van der Heijden-Van der Grinten, no. 203.1 ('This substantial interest of the company may be viewed broadly').

[92] Asser-Maeijer, 2-III, no. 256 ('The law does not contain a direct sanction when the obligation is not complied with') and Van der Heijden-Van der Grinten, no. 203.1 ('The law does not explicitly sanction the non-compliance with the information obligation').

However, certain more general remedies could be applied. First, the disappointed shareholder can initiate proceedings asking the court for a ruling to provide the requested information under forfeiture of a penalty payment. This will usually be done in a preliminary relief proceedings, in which case the President of the District Court is competent. The problem with this remedy is that it is not certain who should be summoned to appear in the proceedings. Dutch law only allows legal persons to be summoned to appear in court. The problem with this is that neither the members of the board of directors nor the members of the supervisory board personally nor the company as a legal person are obliged to answer requests for information. That duty lies with the board of directors and the supervisory board as bodies of the company. However, it is not possible to summon these bodies to appear in court[93].

Section 214 Code of Civil Procedure

The second legal remedy in the event of a refusal to provide requested information can be found in section 214 Code of Civil Procedure. This section offers the opportunity for a provisional examination of witnesses in preparation for proceedings which are being considered. The interesting characteristic of these proceedings for minority shareholders is that they can ask the court to order such provisional examinations even before the proceedings under consideration are actually initiated. The provisional examination can function as a fishing expedition. Existing case law is such that the power to request a provisional examination is not limited by the information rights of Book 2[94]. In general, a minority shareholder qualifies as a concerned party in the sense of section 214, unless the demand for a provisional examination can be qualified as abuse of power[95]. Maeijer states in his comment under HR 20 October, NJ 1996, 120 that in determining whether the minority shareholder is abusing his power when demanding a provisional examination, the question whether a substantial interest of the company conflicts with the obligation to provide requested information should be taken into account. Moreover, even in cases where the court orders a provisional examination of the directors of a company, it is not possible to commit the directors for failure to comply with a judicial order (section 199 subsection 2) since they should, in our opinion,[96] be regarded as parties in the case that could follow the provisional examinations (section 220). Finally, section 213 subsection 2 allows the court to take into account the fact that a witness could become a party in subsequent proceedings when the court determines the consequences it connects to the refusal to answer a question.

Section 843a Code of Civil Procedure

A third potential remedy in the event of a refusal to provide requested information can be found in section 843a of the Code of Civil Procedure. This section gives the minority shareholder the opportunity to demand in court that he be allowed to inspect a private instrument both during and outside the general meeting of shareholders. Three conditions have to be met for the application of this article,[97]. First, the plaintiff needs to have a legitimate interest in the disclosure of the private instrument. In the doctrine there is no clear consensus about the meaning of the word 'legitimate'[98]. However, most writers at least seem to agree that the clause 'legitimate interest' means that a weighing up of interests needs to be

[93] See in the same respect Van der Heijden-Van der Grinten, no. 203.1 ('The law does not oblige the company to provide information, it obliges the board of directors and the supervisory board. Can the company be summoned to appear in court to provide information? That is in our opinion very doubtful').

[94] See HR 20 October 1995, NJ 1996, 120: 'They (the provisions from Book 2, *authors*) are not intended to deprive the shareholders of the power conferred upon them through section 214 or to limit that power. Hereby a non-justifiable difference between shareholders and others than shareholders would be made'.

[95] To be decided based on the question 'Can the plaintiff reasonably not be allowed to exercise his rights because of the disproportionality of the mutual relevant interests?'. See HR 6 February 1987, NJ 1988, 1, HR 11 March 1988, NJ 1988, 747 and HR 19 February 1993, NJ 1994, 345.

[96] Based on two decisions of the Supreme Court, HR 22 December 1995, NJ 1997, 22 and 23.

[97] See Vletter-van Dort, p. 247-259.

[98] See Vletter-van Dort, p. 249-256: 'In doctrine, too, opinions differ concerning the interpretation of this section, especially on how to interpret the clause 'legitimate interest'.

done between those of the plaintiff for disclosure and those of the person who holds the private instrument for keeping it secret[99]. Also, there seems to be consensus that section 843a Code of Civil Procedure is not written to justify so-called 'fishing expeditions'. In his writ of summons the plaintiff needs to specify to a certain extent which private instruments he wants to see disclosed and for what reason. Second, the private instrument has to be related to a legal relationship in which the plaintiff is a party. This condition is not very restrictive; the plaintiff does not have to be a party himself, nor does the private instrument have to embody the legal relationship. Whether the disclosure of unsigned documents can also be demanded under section 843a Code of Civil Procedure, is unclear. Third, the provision is limited to the disclosure of private instruments. Two important judicial decisions have been published recently,. In the first, the President of the Amsterdam District Court[100] decided that private instruments were limited to those documents that were drawn up to be used as evidence in a legal relationship between two parties. However, he judged that it was unnecessary for the documents to be signed. The second decision seems to extend the scope of section 843a even further. In this decision, the Rotterdam District Court[101] decided that, in that particular case, section 843a could be used to obtain disclosure of the minutes of the board of directors, since they could be regarded as private instruments related to a legal relationship in which the plaintiff was a party. It seems remarkable that section 843a can be used to obtain the disclosure of documents meant solely for internal use, even without the Court having made a clear weighing up of the interests concerned[102]. Whatever the exact scope of section 843a, a proposal for a new section 843a has been finalised[103]. Under this new section the obligation to disclose is extended to documents other than private instruments, which will include photos, films, computer files, etc.

Inquiry proceedings

A fourth option involves the Enterprise Section. A group of shareholders have the power to ask the Enterprise Section to initiate inquiry proceedings on the grounds that the refusal by the board of directors and the supervisory board to provide the requested information led to the conclusion that there appears to be well-founded reasons for doubting the correctness of the policy of the company. There are examples of cases from the past where shareholders have tried to obtain information that the board of directors or supervisory board had refused to provide on the basis of 'substantial interests of the company' through the inquiry proceedings. One of them is the HBG inquiry[104], where the lack of information provided to minority shareholders was an important reason for concluding that there were well-founded reasons for doubting the correctness of the policy. In our opinion, an inquiry has one important advantage over the other remedies discussed. This is the fact that the persons appointed to conduct the inquiry can determine whether, in their opinion, a substantial interest of the company prevents the distribution of the information. Should they agree with the judgement of the board of directors and the supervisory board, they can conclude that there has been no case of misconduct, in which case the information remains confidential. This characteristic is a major advantage over 'normal' legal proceedings. In legal proceedings, any information that one party provides to the judge also has to be provided to the other party . Given the fact that the Enterprise Section has always defined its task broadly, it seems possible that it would be willing to apply the inquiry proceedings to determine whether substantial interests of the company did indeed prevent the board from providing the information in question.

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[99] See in this respect J.M. Barendrecht and W.A.J.P. van den Reek, *Exhibitieplicht en bewijsbeslag (Submission duty and evidence attachment)*, WPNR 1994 (6155), p. 741. They conclude that disclosure is only required when there is a specific interest, recognised by objective law, that outweighs other interests involved, including the protection of company secrets and of privacy.

[100] President of the Amsterdam District Court, 15 May 1997, KG 1997, 212.

[101] The so-called 'Center Parcs' case, Rotterdam District Court, 3 October 1996, JOR 1996, 122

[102] Vletter-van Dort also concludes that in this case the Court extended the working of section 843a too far ('The court gives in its decision a broad explanation of section 843a, in my opinion, too broad', p. 259).

[103] Proposal of law 26 855.

[104] See OK 4 July 2001, NJ 2001, 469.

Sections 8 and 11 Commercial Code

A fifth option that is worth mentioning is that in sections 8 and 11 the Commercial Code contains two provisions that a minority shareholder could use in order to obtain requested information. Section 8 gives a minority shareholder the right to ask the court to demand the disclosure of the books and documents that the company is obliged to keep by law during legal proceedings. This means that this option is limited to the disclosure of information that the company is legally obliged to collect; it is not as broad as a general information duty. Old case law seems to imply that this obligation must be understood in a narrow sense[105]. This narrow interpretation means that section 8 does not imply an obligation for the company to disclose the minutes of a general meeting of shareholders[106]. An advantage of section 8, which it has in common with the inquiry proceedings, is that the requested information is initially only disclosed to the court. It is then up to the court to decide whether or not to allow the information to be admitted into the proceedings. However, if the court finds that the information is relevant for the proceedings, the right to hear and be heard implies that the information has to be disclosed to the other party. Finally, section 11 of the Commercial Code contains the obligation to submit the entire accounts to the other party. This obligation is not dependent on the fact that proceedings have been initiated. It encompasses the accounts in their entirety and the information has to be handed over directly to the other party. However, this obligation is limited to a strict group of persons. Section 11 states that the obligation exists with regard to 'a partner'. The question is whether a minority or other shareholder qualifies as a partner in the sense of section 11. Neither Maeijer (Asser-Maeijer, 2-III, no. 47, 'A shareholder cannot as a partner rely on section 11') nor Van der Grinten (Van der Heijden-Van der Grinten, no. 67, 'We would … deny the shareholder the right to information') thinks that a shareholder can be regarded as a partner in the sense of section 11. The Supreme Court ruled once (HR 9 October 1942, NJ 1942, 821) that the word 'partner' also included a shareholder. However, that decision concerned the word 'partner' in section 36(old) of the Commercial Code. Moreover, since 1987, Book 2 no longer refers to shareholders as 'partners', implying that the position of shareholders is now viewed as fundamentally different from that of partners. See also Asser-Maeijer, 2-III, no. 9. The provisions in Book 2 must be considered to prevail over those in the Commercial Code with regard to the legal relationship between company and minority or other shareholder. Based on this, we are of the opinion that a minority shareholder cannot with success base his request for the disclosure of information on section 11 of the Commercial Code.

IV.3 Special audit (the inquiry proceedings)

47. Introduction. So far, the inquiry proceedings have been mentioned several times in this report. Since 1971 it has developed into an important, if not the most important, source of minority shareholder protection.

Its success is also revealed by the statistics: between 1971 and 2001 approximately 260 requests to start inquiry proceedings were filed. In approximately 205 of this 260 cases, the Enterprise Section ruled that there were well-founded reasons to doubt the correctness of the policy.[107] Moreover, between 1997 and 2001, the request for immediate measures was granted

[105] See HR 3 March 1933, NJ 1933, 1518, which decides that the opening of the books can be ordered to prove alleged facts, but that the procedure may not be used to determine whether these kind of facts may have occurred in the last few years.

[106] See Asser-Maeijer, 2-III, no. 46 ('under books and documents cannot be understood minutes and minute books …') and Van der Heijden-Van der Grinten, no. 66 ('Minutes and minute books are not understood under books etc.').

[107] For the period between 1971 and 1987, these figures are based on M.J. van Vliet, *De ontwikkeling van incidentregels in het vennootschaps- en rechtspersonenrecht en de betekenis van het recht van*

in about 60 cases (see no. 49). In approximately 20 of these 60 cases, the decision to grant immediate measures was coupled with the direct judgement that there were well-founded reasons for doubting the correctness of the policy of the company. In another 14 cases, this judgement was made at a later stage in the proceedings. In the remaining cases (approximately 26) the Enterprise Section did not decide that there were well-founded reasons to doubt the correctness of the policy, even though it had granted immediate measures. The fact that the inquiry proceedings seem a popular method for minority protection could very well be caused by the fact that the proceedings contain a cost allocation system that is beneficial for the plaintiff, since it is the company that pays the costs of the inquiry. This is different in other proceedings that purport to protect minority shareholders. This may explain their comparative unpopularity.

The scope of the inquiry proceedings is very broad; section 2:345 subsection 1 states that the object of the inquiry is the policy and the conduct of business. The court may limit the inquiry either to a specific subject or to a specific period of time. The inquiry proceedings can also be seen as a typical Dutch product in the sense that it is not an instrument whose use is limited to the shareholders' benefit. Others may also demand the initiation of an inquiry, making it more or less an instrument for the public welfare. The plaintiff cannot claim for damages through the inquiry proceedings. At the end of the proceedings he can only request measures which are purported to further the interests of the company. The importance of the inquiry proceedings for the protection of minority shareholders justifies a comprehensive discussion of the subject. We will therefore briefly discuss the history and development of the inquiry proceedings in no. 48. In no. 49 we will describe the different stages of the proceedings in more detail, together with an overview of the most important judgements in the inquiry proceedings more specifically related to minority protection, both from the Enterprise Section and in cassation from the Supreme Court.

48. History of the inquiry proceedings. The history of the inquiry proceedings dates back a fairly long way. Two legislative proposals, one in 1890 and the other in 1910, contained predecessors of the current inquiry proceedings. In those two legislative proposals, the protection of minority shareholders was an important theme. However, in the final law from 1928, the theme of minority protection lost much of its importance (see no.1). These proceedings were hardly ever applied; only a single case

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enquête (The development of incident rules in the law regarding companies and legal persons and the meaning of the right of inquiry), in: Handelsrecht tussen 'Koophandel' en NBW (Commercial law between 'Koophandel' and NBW',*1988,* for the period between 1988 and 2001 they are based on research by P.F.G.A. Geerts and A. Doorman. In another 13 cases the Enterprise Section ordered, with the consent of parties, the appointment of an independent expert to report on the price for the shares to be transferred in a dead-lock situation. Also, one has to keep in mind that from the moment that the Enterprise Section obtained the power to order immediate measures, the (preliminary) judgement that

has been published[108]. The unpopularity of the inquiry proceedings may have been caused by the fact that in those days, even when the court ruled that there had been a case of misconduct, it was not capable of attaching any measures to this decision. The current inquiry proceedings has mainly been given shape in a 1971 law. The most important change in the proceedings was that the court was given the power to attach measures to its judgement of misconduct.

49. The proceedings.

Goal of the inquiry proceedings. The goal of the inquiry proceedings can be characterised as twofold. First, its aim is to restore the relationship between the parties involved with the company in the case of conflict. The underlying assumption is that a judicial proceedings can bring some sort of relief. We may describe this as the forward-looking aspect of the inquiry proceedings. There is also a backward-looking aspect. The inquiry proceedings can also be used in hindsight, to establish factually what has happened and to assess responsibility for mistakes that may have been made. In every proceedings, the balance between the forward and backward-looking aspects will be different. The Enterprise Section decided that using the inquiry proceedings solely to enable the use of the measures described in section 2:356, without the necessity of holding an inquiry to establish misconduct, does not amount to misuse of the inquiry proceedings[109]. In this example, the forward-looking aspect strongly dominates. However, there are other examples where the backward-looking aspect prevails. The Supreme Court has ruled[110] that the Enterprise Section is permitted to establish that there has been a case of misconduct without attaching any measures to it. This also means that the plaintiff is allowed to merely demand a declaratory ruling that there has been a case of misconduct, without asking for any further measures.

Subject of the inquiry proceedings. Having briefly characterised the inquiry proceedings and its aims, the next question is what exactly is the subject. Section 2:345 subsection 1 states that the subject is 'the policy and conduct of business *of a*

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there appear to be well-founded reasons to doubt the correctness of the policy does not automatically imply that an inquiry is also ordered.

[108] Breda District Court, 27 March 1934, NJ 1934, 567.

[109] See OK 26 April 1972, NJ 1973, 6, commented on by Boukema in TVVS 1973, p. 105-106. However, as the Supreme Court ruled in the Gucci case (HR 27 September 2000, NJ 2000, 653), the Enterprise Section is not capable of granting remedies without having ordered an inquiry.

[110] See HR 10 January 1990 (Ogem inquiry), NJ 1990, 466.

legal person either as a whole or in respect of a part thereof or in respect of a specific period'.

An interesting question is whether the Enterprise Section is passive or whether it may order an inquiry into a broader or a different subject than requested in the application by the plaintiffs. Maeijer[111] is of the opinion that the Enterprise Section is allowed to do so and bases his opinion on two decisions by the Enterprise Section[112]. Van der Grinten[113] does not agree with this view; in his opinion the Enterprise Section is not allowed to order an inquiry into a different or broader subject than that demanded by the plaintiffs.

The above phrase in italics makes clear that the inquiry proceedings is not limited to actions by the board of directors or the supervisory board. In the Ogem inquiry the Supreme Court decided that the misconduct of constituent bodies of the company or of persons as part of those constituent bodies must be attributed to the company[114]. Even before the Ogem inquiry, the Enterprise Section had decided that actions from the general meeting of shareholders can lead to the conclusion of misconduct[115].

Who may demand an inquiry? The next relevant question is who may request the Enterprise Section to order an inquiry into the affairs of the company. We will limit ourselves to the NV and the BV. Section 2:346 subsection b gives this power both to a shareholder and to a group of shareholder and to a depositary receipt holder or to a group of depositary receipt holders who represent at least 10% of the issued capital, or who are entitled to an amount in shares or depositary receipts issued therefor with a nominal value of € 225,000 or such lesser amount as is provided by the articles.

Section 2:347 describes a second group that is competent to demand that the Enterprise Section initiate an inquiry proceedings. It states that the right to file an application shall be also vested in an association of employees which has amongst its members persons working for the company and has had full legal capacity for at least two years, provided its subject under its articles is to promote the interests of its members as employees and it is active in such capacity in the business sector or in the

[111] See Asser-Maeijer, 2-III, no. 522 ('The Enterprise Section can in my opinion order a broader inquiry than has been demanded in the enquiry request').
[112] See OK 26 January 1978, TVVS 1978, p. 251 and OK 29 August 1985, NJ 1986, 578 (the Howson Algraphy inquiry).
[113] See Van der Heijden-Van der Grinten, no. 363 ('We would want to assume that the Enterprise Section is passive to the extent that it cannot order a broader inquiry than has been requested by the applicants').
[114] See HR 10 January 1990, NJ 1990, 466, consideration 7.4 ('…mismanagement of the constituent bodies of the company or of those who are part of them, must be attributed to the company').
[115] See OK 22 January 1976, NJ 1977, 341 ('…because that general meeting of shareholders as constituent body of the company falls under the term 'company' used in section 53 subsection 1 …') and OK 14 January 1993, NJ 1993, 460 ('Moreover, the court rejects the proposition … that a decision which is taken in the general meeting of shareholders with the help of the majority shareholder must be attributed more to it than to the company…').

company. This section gives the power to demand an inquiry to trade unions, not only large, central unions, but also to smaller, more specific unions. The law explicitly does not grant the right to demand an inquiry to the works council.

A third person who may demand an inquiry is the advocate general of the Amsterdam Court of Appeal. Section 2:345 subsection 2 states that he may do so for reasons of public interest. This subsection also gives him the power to charge one or more experts with the gathering of information about the policy and the conduct of business. The company is obliged to provide the requested information and shall allow the experts to inspect its books and records, even though the law does not provide a sanction should the company not co-operate.

The phrase 'public interest' is hard to define. In the Nedlloyd inquiry (OK 30 March 1989, NJ 1990, 176 and HR 5 September 1990, NJ 1991, 62), the Supreme Court decided that a '*specific public interest*' is required, to be decided on the basis of facts and circumstances. This implies that more general and important interests, surpassing purely individual interests, may be harmed[116]. This means that the advocate general is not free to transform any individual interest into a public interest and that not every act in conflict with private law automatically conflicts with the public interest[117]. Circumstances that may make an interest a public interest include when the continuity of a large company is in danger (HR 10 January 1990, NJ 1990, 466), when there is a serious threat to employment (OK 28 December 1981, NJ 1983, 25), when the reliability of the (public) annual accounts is in danger (OK 7 December 1989, NJ 1990, 242) and when there are strong suspicions of criminal behaviour (OK 17 March 1983, NJ 1984, 462)[118].

Section 2:346 subsection c extends the group of people who may demand an inquiry to a fourth group. It states that it is possible to grant this right to a person or group of people who are authorised to do so by the articles or under an agreement with the company. Maeijer considers that it is possible to use this provision to grant the right to demand an inquiry to the works council[119]. As far as we have been able to ascertain, section 2:346 subsection c has never been applied.

Finally, the law explicitly does not grant the power to demand an inquiry to the constituting bodies of the legal person. This means that the board of directors, supervisory board and general meeting of shareholders in themselves do not have the power to initiate an inquiry proceedings. However, this does not mean that individuals from these constituting bodies may also not demand an inquiry; if they, as shareholder

[116] See advocate general Verburg in his conclusion (sub 18) in the Nedlloyd inquiry for the Supreme Court (HR 5 September 1990, NJ 1991, 62).
[117] See Asser-Maeijer, 2-III, no. 524.
[118] See Asser-Maeijer, 2-III, no. 524 for more examples.

or holder of depositary receipts reach the relevant threshold, they are individually competent to do so[120].

Other conditions; previous written notice of objections. Section 2:349 subsection 1 states that the applicants shall have no *locus standi* if it appears that they have not given advance written notice of their objections to the policy or the conduct of business to the board of directors and the supervisory board and that a period has elapsed such as is needed to provide the company with a reasonable opportunity to examine such objections and take the necessary measures. This section has been included to prevent companies being taken by surprise, acknowledging the fact that the initiation of an inquiry proceedings is usually harmful to the public image of the company. The Enterprise Section interprets the obligations of section 2:349 subsection 1 for the application reservedly.

It is not necessary for the applicants to include a request to investigate the objections and to take measures in their written notice of objection [121]. The condition that the objections must be made in writing is also not intended to set too many limitations. The Enterprise Section is satisfied if the objections have been mentioned during a general meeting of shareholders of which minutes have been kept[122] and does not object to a situation where the objections have been mentioned in a writ of summons that initiated a previous Kort Geding[123]. Finally, the applicants also do not need to mention in their written notice of objections that they object because of a potential request for the initiation of an inquiry[124]. Maeijer summarises these decisions by stating that the Enterprise Section interprets section 2:349 subsection 1 on the basis of its purpose; it suffices that the objections have been written down somewhere[125].

There must be a reasonable amount of time between the written notice of objections and the application for an inquiry. What is reasonable must be judged according to all the circumstances of the case. When determining this, the period of time that the company has been aware of the objections plays a role, even if these objections were not yet in written form[126]. However, the plaintiff's application for an inquiry may also

[119] See Asser-Maeijer, 2-III, no. 521 ('I would also consider it possible to grant the power to demand an inquiry to the works council').
[120] See OK 26 April 1972, NJ 1973, 6 and OK 3 May 1972, NJ 1973, 7.
[121] See HR 1 October 1986, NJ 1987, 914 ('As far as … is meant to imply that for admissibility of the application it is essential that the written notice of objections contains a request to investigate these objections and on the basis of that to take measures, it sets a condition that is not required under section 2:349 subsection 1').
[122] See OK 3 January 1977, NJ 1977, 342.
[123] See OK 25 August 1988, NJ 1989, 308 ('… it must be assumed that the writ mentioned in this case of summons may also be considered to be a written notice of objections as meant in section 2:349 subsection 1 …').
[124] See OK 9 June 1988, De Naamloze Vennootschap 66, p. 184.
[125] See Asser-Maeijer, 2-III, no. 525.
[126] See Asser-Maeijer, 2-III, no. 525.

be inadmissible if he waits too long after having notified the company of his objections[127].

Other conditions; the relationship between the objections in the written notice and the well-founded reasons to doubt the correctness of the policy. It is not necessary for the well-founded reasons to be explicitly mentioned in the written notice containing the objections. However, the Supreme Court decided that 'there must be such a close relationship between the objections and the reasons that they concern the same subject[128]'. The aim behind this is again that the company must not be taken by surprise by the inquiry application.

Immediate measures. Since 1994, section 2:349 subsection 2 makes it possible to ask the Enterprise Section to take immediate measures. Before 1994, one had to ask the President of the District Court in Kort Geding to take these immediate measures. His role has now been reduced (see also no. 9). The most remarkable feature of section 2:349 subsection 2 is its broadness. It requires that the plaintiffs also file an application for the initiation of the inquiry proceedings. However, when choosing an appropriate immediate measure or measures, the Enterprise Section is not limited to the list of remedies in section 2:356. Possible immediate measures include a prohibition on directors or supervisory board members to act on behalf of the company, the appointment of temporary directors or supervisory board members and the prohibition to carry out a resolution. One does not have to specify which immediate measure one is requesting from the Enterprise Section, nor is the Enterprise Section in any way limited by the application of the plaintiffs[129]. The plaintiff may demand immediate measures at any stage in the proceedings, their application, however, cannot be extended past the end of the proceedings. Grounds for demanding immediate measures include the condition of the legal person and the interest of the inquiry.

As mentioned above (see no. 47), in approximately 60 cases in the period 1997-2001 the Enterprise Section decided that immediate measures should be taken. In approximately 50 of these, immediate measures were taken due to the existence of a deadlock situation in the

[127] See OK 5 July 1984, NJ 1988, 142 ('… the applicants have given the impression that they had come to terms with the situation and would not attach consequences to the continuation of it').
[128] See HR 18 June 1980, NJ 1981, 547.
[129] See Asser-Maeijer, 2-III, no. 518 ('It does not have to be specified which immediate measures one wants to see taken. And here too, the Enterprise Section can take different measures than those that are demanded'.

company. The aim of the immediate measures in these cases was to re-enable effective management of the company. Recent examples in case law include OK 26 October 2000, JOR 2001, 5. In this case the Enterprise Section decided that there was a deadlock in the decision-making process in the board of directors and the general meeting of shareholders. By way of an immediate measure, thus postponing its decision to order an inquiry, the Enterprise Section appointed a supervisory board member with a decisive vote in the board of directors and the general meeting in the event of deadlock.. Other examples can be found in OK 16 November 2000, JOR 2001, 9, suspension of a director and appointment of another director, and OK 30 November 2000, JOR 2001, 11, appointment of a director, appointment of an independent supervisory board member with a decisive vote in the board of directors in the event of deadlock and the transfer of the voting rights on the shares from the shareholders to an independent supervisory board to be appointed.

In the remaining 10 cases, immediate measures were granted because of an entanglement of interests of those involved with the company. In these situations, the immediate measures should rather be characterised as standstill measures, i.e. measures to prevent the continuation of a situation that is harmful to the company, and its minority shareholders. Recent examples in case law include OK 30 November 2000, JOR 2001, 4, in which case the Enterprise Section appointed a supervisory board member. The Enterprise Section determined that 'taking into account the special circumstances of the case, the supervisory board member to be appointed shall guard the legitimate interests of the minority shareholders in particular'. For the supervisory board member to be able to do so, the Enterprise Section decided that all transactions between the company and the majority shareholder(s) should be approved by him and that he would have the power to appoint the external accountant and external experts, if necessary. The Enterprise Section also nullified two resolutions on the grounds that they were not in the interests of the company. Another example can be found in OK 1 March 2001, JOR 2001, 106, in which case the Enterprise Section considered that 'there are strong indications that Den Boer, through the policy conducted by her in her capacity of director … purports more to serve her personal interests than the interests of the company, contrary to her role as director'. Among other things, the Enterprise Section based this judgement on the fact that Den Boer, as director and shareholder, did not provide enough information to the other shareholder, who was not a director. On the basis hereof, the Enterprise Section suspended Den Boer as director and appointed an independent director.

Phases in the inquiry proceedings; well-founded reasons and misconduct. There are five decision points for the Enterprise Section in each full inquiry proceedings. First, the Enterprise Section has to decide whether the inquiry request is admissible (section 2:349). Second, the Enterprise Section must decide whether there are well-founded reasons for doubting the correctness of the policy (section 2:351 subsection 1). Third, on the basis of the report by the persons appointed, the Enterprise Section has to establish whether it is of the opinion that the case amounts to a case of misconduct (section 2:355). Fourth, once it has established misconduct, it has to decide whether or not to take measures, and if so, which measures to take (section 2:355 and 2:356). These four decisions are taken in each full inquiry proceedings. The fifth, concerning immediate measures, is only relevant if the plaintiffs desire these immediate measures.

Taking these decision points into account, we can distinguish five phases in the inquiry proceedings[130]. In the first phase, the plaintiffs have to notify the company in writing of their objections (section 2:349). Another condition for admissibility of the request is that the plaintiff belongs to one of the groups entitled to request an inquiry (see no. 49 previous).

In the second phase, the plaintiffs file a written application with the Enterprise Section in which they request that the Enterprise Section appoints one or more persons to undertake an inquiry. In order to prevent persons filing an application light-heartedly, section 2:350 subsection 2 enables the company to claim for damages from the plaintiffs with the Enterprise Section, should the Enterprise Section decide that the application was not made on reasonable grounds. Here we witness a provision that is aimed at preventing a minority shareholder abusing a right provided by the law (see also no. 66).

In the third phase, the Enterprise Section decides that there are well-founded reasons for doubting the correctness of the policy (section 2:350 subsection 1). The Enterprise Section then appoints one or more persons to undertake the inquiry (section 2:345 subsection 1), determines the maximum amount of costs for the inquiry, and determines the remuneration of the persons appointed (section 2:350 subsection 3). In principle, the company pays the costs of the inquiry, unless the report makes it clear that the application was not made on reasonable grounds. In that case, the Enterprise Section may decide that the company can recover the costs from the applicants, another provision aimed to prevent abuse of rights.

Sections 2:351, 2:352 and 2:352a contain provisions that regulate the powers of the persons appointed to undertake the inquiry. Section 2:351 subsection 1 confers three categories of powers on the persons appointed to undertake the inquiry. First, they shall be entitled to examine such books and records of the company as they shall consider necessary for the proper performance of their duties. Second, the assets of the company must be shown to them on request. Third, the law puts an obligation on the (former) directors, supervisory board members and employees to provide all such information as shall be necessary for the implementation of the inquiry. Subsection 2 states that the Enterprise Section may, upon the application of the persons appointed

[130] See Slagter, p. 431-432.

to undertake the inquiry, for the proper implementation of their duties, authorise them to inspect the books and records and to require the production to them of the assets of any legal person *closely connected* with the company in respect of which the inquiry is taking place. Section 2:352 sets out what can happen should the persons appointed to undertake the inquiry not be able to exercise the powers that section 2:351 gives them. Subsection 1 states that in such a case the President of the Enterprise Section may issue such orders as the circumstances require. These orders may include (subsection 2) an instruction to the police to provide assistance and a search warrant. Finally, section 2:352a states that the persons charged with the inquiry may request the Enterprise Section to hear one or more persons or witnesses. The investigators may attend the hearing and put forward questions.

A very important question that needs to be answered is what exactly falls under 'reasons to doubt the correctness of the policy'. There is no general rule that can be applied to answer this question. From studying case law, the following picture arises. Maeijer defines 'well-founded reasons' as the facts and circumstances that together amount to a reasonable chance that the inquiry will reveal misconduct[131]. In the appreciation of these facts and circumstances, the Enterprise Section has to respect a certain discretion with regard to the company's policy. Another feature is that the power to order an inquiry is a discretionary power. Even if the Enterprise Section finds that there are well-founded reasons for doubting the correctness of the policy, it is still under no obligation to order an inquiry (see the word 'can' in section 2:345). This means that the Enterprise Section has to weigh all the interests involved in that particular case and that the Enterprise Section has to be given a broad margin of appreciation in the weighing up of these interests[132]. Understandably, the circumstances that lead to the conclusion that there are well-founded reasons vary strongly. Up to 1996, the circumstances that most often led to this conclusion were not keeping interests separate, a deadlock in the decision-making process and not preparing or publishing the annual accounts[133]. Apart from these fairly general grounds for assuming that there are well-founded reasons for doubting the correctness

[131] See his commentary under OK 29 October 1980, NJ 1981, 272 and HR 18 June 1980, NJ 1981, 547 and Asser-Maeijer 2-III, no. 526.

[132] See HR 26 June 1996, NJ 1996, 730 ('The Enterprise Section, …, must be given a broad margin of appreciation').

[133] See A.F.M. Dorresteijn, *De ondernemingskamer en het enqueterecht (The Enterprise Section and the right of inquiry)*, in: W.J. Slagter et al., *25 jaar Ondernemingskamer. De betekenis van de OK voor ondernemend Nederland (25 years Enterprise Section. The meaning of the Enterprise Section for entrepreneurial Netherlands*, The Hague, 1996, p. 49.

of the policy, there are also more specific grounds, related to the protection of the minority or other shareholder. These can be divided in three categories.

First, ignoring statutory rules or rules in the articles of association that protect minority or other shareholders. In OK 26 January 1978, TVVS 1978, p. 251, the Enterprise Section decided that one of the reasons why well-founded reasons existed was that the company had not complied with provisions in the articles concerning the convocation of the general meeting (no invitation to shareholder) and that it therefore 'was doubtful whether the company had taken the legitimate interests of this shareholder sufficiently into account'. In OK 1 May 1980, NJ 1981, 243, the Enterprise Section found that both the fact that 'the taking of decisions by which the interests of the applicant as minority shareholder could be damaged' and the fact that 'there are no members of the supervisory board, even though the articles require these' mean that there are well-founded reasons. We can also mention the decision OK 14 January 1993, NJ 1993, 460. In this judgement, the Enterprise Section decided that lending out a large sum of money, thereby factually handing over the power to decide over a large part of its property, without demanding guarantees for the repayment, can amount to a well-founded reason for doubting the correctness of the policy, especially when no guarantees were demanded to protect minority shareholders, and the company had not adequately communicated with these minority shareholders about this matter. Finally, a judgement by the Enterprise Section of 1 March 2001, JOR 2001, 131 is also relevant. A board member, who was also a majority shareholder, concluded transactions without the approval of the general meeting of shareholders, notwithstanding the fact that the articles of association required such action. The transactions also contained the risk of conflict of interest. In such cases, there are special information rights for minority shareholders. The Enterprise Section concluded that these special information rights had not been respected, leading to the conclusion that there were well-founded reasons for doubting the correctness of the policy.

A second ground to doubt the correctness of the policy related to minority protection lies in a conflict between a majority and a minority shareholder, especially if this conflict results in a deadlock in the management of the company. In the case of OK 3 January 1977, NJ 1977, 342, the Enterprise Section decided that 'through insoluble differences between applicant (*majority shareholder*) and her son (*minority shareholder, together they formed the board of directors*), the management of the company is in deadlock'. Interesting to note in this decision is that the applicant was the *majority* shareholder, implying that actions by the *minority* shareholder can also give reason to doubt the correctness of the policy[134]. Moreover, the condition that the plaintiffs themselves cannot be blamed for anything is not a condition that may be set in the inquiry proceedings[135].

Third, providing insufficient or incorrect information to the minority or other shareholder. In OK 21 September 1978, NJ 1979, 403, the Enterprise Section decided that the company had failed to provide the applicants with information concerning the allocation of costs. Insight into this cost allocation is a legitimate aim of the applicants. Because the company failed to provide this information, there was room to doubt whether the company had adequately taken the legitimate interests of the applicants into consideration. This, together with the fact that the mandatory supervisory board was non-existent, led to the conclusion that there were well-founded reasons for doubting the correctness of the policy. An important recent Enterprise Section decision concerning the distribution of information to minority shareholders is OK 8 October 1998, NJ 1999, 348. In this decision, the Enterprise Section decided that the applicants do not as such have the right to receive all information about the policy and the conduct of business. But the starting point is that the company has to observe special care in

[134] However, we feel that in this case it was not specifically the *actions* of the minority shareholder that led to the conclusion that there were well-founded reasons, but rather the resulting deadlock situation.
[135] See OK 23 June 1977, NJ 1978, 440 and HR 18 June 1980, NJ 1981, 547.

relation to the applicants - minority shareholders - and, more specifically, prevent entanglement of the interests of the company and of the board of directors and/or the majority shareholders, whether or not at the expense of the minority shareholders, and that with regard to this, the company discloses the state of affairs as far as possible.

Section 2:353 subsection 1 states that once the investigators have finished their work and have written their report, this report shall be deposited at the Office of the Clerk of the Amsterdam Court of Appeal. Subsection 2 states that the advocate general, the company and the applicants and their lawyers shall receive a copy of the report. The Enterprise Section may determine that the report shall also be available for inspection, either in full or in part, by any other persons designated by it or that it shall be open for public inspection. Subsection 3 contains another provision aimed at securing the secrecy of the outcome of the investigation. Persons other than the company shall be prohibited from divulging information from the report to third parties to the extent that such a report is not available for public inspection unless authorised by the President of the Enterprise Section.

In the fourth phase, it appears from the inquiry report that the policy of the company can be characterised as *incorrect*. However, the mere fact that the policy was incorrect does not necessarily imply that there has been a case of misconduct. In this case (incorrect policy, but no misconduct), the Enterprise Section cannot take the measures as described in section 2:356. It can order that the report shall be available for inspection, either in full or in part, by any other persons designated by it or that it shall be open for public inspection (section 2:353 subsection 2). This 'measure' may be seen as a form of public penance for the company.

Finally, in the fifth phase, the Enterprise Section decides on the basis of the report that there has been a case of misconduct.

In the Gucci case mentioned earlier, the Enterprise Section concluded that there was a case of misconduct. However, contrary to statutory provisions (section 2:355), the Enterprise Section considered it possible to draw this conclusion without appointing a person as an investigator, thereby skipping the inquiry part of the proceedings[136]. However, the Supreme Court ruled

[136] See OK 27 May 1999, NJ 1999, 487 ('… in the event that the relevant facts with regard to the disputed policy have been determined when judging the application of section 2:345 and an investigation into those facts will not or cannot bring forward relevant information with regard to those facts and would therefore be without sufficient reason, the Enterprise Section has the power to decide that there has been a case of misconduct, even without an investigation into the facts by a person appointed by the Enterprise Section …').

that this was contrary to the law and that a judgement of misconduct and remedies may only be ordered after an investigator has conducted an inquiry into the situation[137].

The decision that there has been a case of misconduct is a judgement that the Enterprise Section and not the investigators has to make. However, the investigators may in their report give their opinion on the question whether there has been a case of misconduct and which measures should in their opinion be taken. The Enterprise Section will take note of these opinions but is not bound by them[138].

As with the criterion 'well-founded reasons for doubting the correctness of the policy', there is no easy test to determine whether there has been a case of misconduct. Usually, the test that is applied is whether the company has acted contrary to the elementary principles of responsible entrepreneurship[139]. The notion of misconduct is not limited to matters of business economics or of social affairs[140]. Moreover, from the word 'elementary', it becomes clear that the test by the Enterprise Section is a marginal one, assuming a large amount of discretion for the company. 'Was it reasonably possible for the company, given the circumstances, to pursue the policy it has pursued' is the question the Enterprise Section will seek to answer. We can draw a distinction between material and procedural grounds for misconduct. In general, the test by the Enterprise Section with regard to procedural matters is less marginal than with regard to the material side of the policy. The notion of misconduct was further explained in the Ogem inquiry decision[141]. From it, the following five lessons can be drawn[142]. First, not every mistake with regard to the policy of the company means that there has been misconduct; the mistake has to be of a certain minimum seriousness. Second, a single act can amount to misconduct, especially if this single mistake has serious negative consequences for the company. Third, misconduct must be established at the level of the legal person; misconduct by constituent bodies or people within these constituent bodies must be attributed to the legal person. Fourth, for the conclusion of mismanagement it is unnecessary to

[137] See HR 27 September 2000, NJ 2000, 653 ('The second procedure, that of section 2:355, will not become relevant until the application of section 2:345 has been sustained and after the report containing the results of the investigation has been filed at the court registry on the basis of section 2:353').
[138] See, for example, OK 18 March 1976, NJ 1978, 317, OK 21 June 1979, NJ 1980, 71 and OK 26 May 1983, NJ 1984, 481.
[139] This criterion was first formulated in the Batco inquiry (OK 21 June 1979, NJ 1980, 71).
[140] See OK 15 November 1973, NJ 1974, 293 (… the opinion of the defendant that misconduct … is restricted to misconduct with regard to business economic considerations and social affairs is too limited and finds no support in the history of the realisation of the new inquiry law').
[141] See HR 10 January 1990, NJ 1990, 466.

determine that the directors and/or the supervisory board members can personally be blamed for the misconduct, nor is it necessary for damage to have been caused. Finally, the question of whether there has been a case of misconduct must be answered on the basis of the circumstances and the tasks of the directors and supervisory board members at the time of conducting the policy.

One decision which is particularly relevant for the protection of minority shareholders is OK 11 January 1990, NJ 1991, 548. In this judgement, the Enterprise Section based its decision that there had been a case of misconduct on three grounds. These are the fact that continuation of the policy, resulting in decreasing turnover and very low profitability, would have led to serious problems for the company, the fact that the director had not taken adequate measures to secure a suitable successor and the fact that *the director was not concerned with the interests of the minority shareholders, even though they owned nearly half of the shares in the company.*

Another important decision for the protection of minority shareholders is OK 30 November 2000, JOR 2001, 4. In this judgement, the Enterprise Section again decided that a company has to observe a specific standard of due care towards minority shareholders. More specifically, it decided that a company must prevent entanglement of its own interests, the interests of the board of directors and/or the interests of the majority shareholder(s), especially if family relationships are involved, since this may damage minority shareholders. In addition to all this, the Enterprise Section also re-emphasised the importance of an adequate provision of information to minority shareholders and of adherence to formal legal requirements.

Remedies

If the Enterprise Section establishes that there has been a case of misconduct, it can order one or more of the remedies listed in section 2:356. The Enterprise Section may only order remedies when such is demanded by the original applicants, others entitled to demand an inquiry or the advocate general. However, these persons do not have to specify which remedies they want the Enterprise Section to take[143]. If they do demand

[142] Maeijer also mentions these five points in Asser-Maeijer, 2-III, no. 534.

[143] At least in the opinion of Maeijer (see Asser-Maeijer 2-III, no. 533 and Maeijer's comment under HR 4 November 1987, NJ 1988, 578). Van der Grinten does not agree with this view (see Van der Heijden-Van der Grinten, no. 367).

certain specific remedies, the Enterprise Section is not bound by their request[144]. The list of remedies is a comprehensive enumeration. Section 2:356 mentions the following six remedies.

First, the Enterprise Section can order the suspension or nullification of a resolution of the directors, the supervisory board members, the general meeting of shareholders or of any other constituent or corporate body of the legal person. This nullification works with regard to everyone, with section 2:357 subsection 2 giving the Enterprise Section the power to regulate the consequences of the nullification. A second possible remedy that the Enterprise Section may order is the suspension or dismissal of one or more directors or supervisory board members. This remedy is mainly applied in situations in which there is a deadlock in the decision-making process, usually together with the next remedy, the temporary appointment of directors and/or supervisory board members. The third remedy can be seen as complementary to the second; the Enterprise Section may temporarily appoint one or more directors or supervisory board members. Once appointed by the Enterprise Section, the company cannot suspend or dismiss temporary directors or supervisory board members. Fourth, the Enterprise Section can order the temporary derogation from such provisions in the articles of association as it considers necessary. This measure is usually taken together with the suspension, dismissal and/or appointment of a director and/or a supervisory board member in order to end the deadlock in the decision-making process and is always a temporary measure. The fifth remedy that the Enterprise Section can order was added in 1989. It enables the Enterprise Section to order the temporary transfer of the shares to a nominee. This remedy will usually be applied if there is a deadlock in the decision-making process in the company due to the fact that two or more groups of shareholders cannot reach agreement, resulting in the situation that decision-making in the general meeting of shareholders becomes impossible. Finally, as a last possible remedy, the Enterprise Section can order the winding up of the company. This is equivalent to the 'death penalty' in company law; this remedy is hardly ever taken[145]. The legislator realises the severe consequences of winding up the company. Section 2:357 subsection 6 takes this into account. It states that the Enterprise Section

[144] Compare OK 16 July and 1 October 1987, NJ 1988, 579 and Maeijer's comment under this decision ('Striking in this case is that the Enterprise Section … ordered more and different remedies than were requested by the applicant and *procureur-generaal*').
[145] Maeijer lists 5 examples (Asser-Maeijer, 2-III, no. 537): OK 12 January 1974, NJ 1974, 292, OK 1 April 1982, TVVS 1983, p. 310, OK 30 September 1982, TVVS 1983, p. 70, OK 8 October 1987, NJ 1989, 270 and OK 9 May 1996, JOR 1996, 57.

shall not issue an order to wind up the company if this would be contrary to the interests of the shareholders or the employees of the company or to the public interest. With regard to this remedy, it is important to remember that it is technically the legal person that is wound up. This means that the enterprise itself can be sold, thereby continuing its activities.

Two cases which show examples of remedies after the conclusion of misconduct with regard to the protection of minority shareholders are the following. In OK 22 December 2000, JOR 2001, 29, the Enterprise Section grounded its decision of misconduct on the fact that the company continued to provide substantial loans to a company which was in financial trouble and which did not pay interest on existing loans, nor repay them without asking for security rights. The request was filed by a minority shareholder (10%) who was not a director of the company. As remedies, the Enterprise Section ordered the dismissal of the two directors (one of which also provided the remaining 90% of the share capital), the appointment of the minority shareholder as director for a period of two years, and the temporary transfer of the shares of the majority shareholder to a nominee, in this case the minority shareholder. In OK 21 June 2001, JOR 2001, 184, the Enterprise Section decided that 'the Enterprise Section agrees with the investigator that in obliging the company to pay a management fee in this case, the interests of the company and those of the minority depository receipt holder were not taken into account to the extent necessary'. Coupled with the judgement that the company had seriously breached its duty to provide information to the minority depository receipt holder, the Enterprise Section concluded that there had been a case of misconduct. The Enterprise Section appointed a supervisory board member, with the powers of supervisory board members of statutory two-tier companies. The Enterprise Section further explained this appointment by stating that 'it could be useful to appoint a supervisory board member to provide for supervision and communication on the policy of the company … so that he can, to the extent necessary, forcefully intervene to protect the interests of the minority depository receipt holder'.

Finally, section 2:357 contains several more provisions that are related to the remedies of section 2:356. These include the rule that the Enterprise Section shall set the period of the validity of the temporary orders, which period may be extended or shortened (subsection 1), and more importantly, the rule that an order made by the Enterprise Section may not be nullified by the company, any resolution to that effect being null and void (subsection 3).

IV.4 Rights concerning the conduct of assemblies

50. Convocation and agenda (see also nos. 21 and 23). Section 2:219(109) states that in principle the board of directors and the supervisory board have the power to convene a general meeting of shareholders, but that the articles may determine that others also have this power. Section 2:220(110) gives a group of shareholders who represent at least 10% of the issued capital the power to convene a general meeting. However, for this they require the authorisation of the President of the District Court,

which will not be given if the shareholders have not first requested the board of directors and the supervisory board to convene a meeting. Section 2:221(111) sets as an extra condition that the shareholders must have a reasonable interest in the convocation of the meeting. Section 2:222(112) further extends the power for shareholders to convene a general meeting. It states that should the board of directors or supervisory board fail to convene a mandatory general meeting (sections 2:218(108) and 2:218a(108a)), every single shareholder may, after authorisation by the President of the District Court, convene the meeting instead. The system of Dutch company law implies that those who have the power to convene the general meeting also possess the power to decide which items should be placed on the agenda. This means that in most circumstances shareholders do not possess the power to add items to the agenda. Two exceptions to this general rule are that the articles may provide that a shareholder or group of shareholders have the power to add items to the agenda and that after authorisation to convene a meeting, a shareholder or group of shareholders may also decide on agenda items. Further, a minority shareholder has the right to put forward any item he desires at the item 'questions before closure'. The general meeting may then, by majority, decide that this item should be placed on the agenda for the next meeting[146].

In his dissertation, Dumoulin[147] agrees with the view that the general meeting may decide to convene a new meeting, and therefore decide on the agenda for that meeting. as a result of a discussion during the item 'questions before closure'. However, in his opinion the general meeting also possesses a more general power to convene a general meeting of shareholders. He bases his opinion on the system of the law and on a decision by the Supreme Court[148]. He states that in principle the general meeting of shareholders is autonomous in exercising its rights, meaning that it should also be allowed to autonomously decide when to exercise those rights. Because the exercise of its rights is mainly limited to the context of a general meeting of shareholders, it should logically be allowed to convene such a meeting. Rules concerning the convocation of general meetings are meant to guarantee an orderly course of the meetings and not to guarantee that the general meeting will be dependent on the board of directors or supervisory board in exercising its rights, autonomous or other. Dumoulin also states that under special circumstances the law or the principles of reasonableness and fairness may bring about that shareholders (in Kort Geding) may demand the addition of points to the agenda for a general meeting already convened[149].

[146] See Van der Heijden-Van der Grinten, no. 205 ('if the agenda of a meeting contains a 'questions before closure' item, the general meeting may decide that matters that are put forward under this item should be discussed and decided on at a next meeting') and Asser-Maeijer, 2-III, no. 269 ('It is defendable that the general meeting during the item 'questions before closure' and after discussion can decide to further discuss and decide on these matters in a next general meeting, to which end this item will be put on the agenda').
[147] S.H.M.A. Dumoulin, *Besluitvorming in rechtspersonen (Decision-making in legal persons)*, dissertation Groningen, Kluwer, 1999, no. 167, hereafter referred to as Dumoulin.
[148] See HR 16 June 1944, NJ 1944/45, 443.

As mentioned earlier (see no. 19), the proposal for a new section 2:114a will give shareholders who hold 1 percent of the issued capital or shares with a market value of € 50 million (this concerns listed companies) the right to place an item on the agenda of the general meeting of shareholders.

51. Chairman, adjournment and voting. Dutch company law does not contain any provisions that regulate who should act as the chairman of the general meeting. Usually, the articles contain a provision that regulates this matter. In most cases, it will be the president of the supervisory board who chairs the general meeting of shareholders. If the articles do not contain a provision on this subject, it is up to the general meeting of shareholders itself to decide who will be the chairman. His role is an important one. Section 2:13 subsection 3 states that the ruling pronounced by the chairman in respect of the outcome of a vote shall be decisive. The same applies to the contents of a resolution passed, to the extent that the vote related to a proposal is not made in writing.

Dutch company law does not contain any provisions that enable a general meeting to be adjourned. If the adjournment is for a shorter period, the chairman of the general meeting has the power to order such an adjournment, with a right existing for a minority shareholder to demand this adjournment. In deciding on the request by the minority shareholder, the chairman will have to take into account the principles of reasonableness and fairness. The situation is different should the adjournment be for a longer period. In that case, the adjournment of the general meeting could be regarded as a closure plus a decision to convene a new meeting. This means that the rules of Book 2 concerning the convocation of general meetings apply[150].

Further, Dutch company law contains hardly any provisions that regulate the way in which the voting in the general meeting of shareholders takes place. Section 2:13 subsection 4 only states that should the correctness be contested immediately after the ruling pronounced by the chairman, another vote shall be taken if so desired by the majority at the meeting, or, if the original vote was not taken *per capita* or by poll, by anyone present entitled to vote,thereby including minority shareholders. Usually, the way in which the voting takes place is arranged in the articles of association. If the

[149] See Dumoulin, no. 278.
[150] See in this respect, Dumoulin, no. 199.

articles contain no provisions on this subject, the individual shareholder has no right to seek a specific way of voting.

IV.5 Right to cause the company to sue its directors

52. Representation and discharge. It is possible to imagine certain situations where the company will decide to sue one or more of its directors. The problem then is who will represent the company in the litigation. Under normal circumstances, the company is represented by the board of directors. It is clear that in case of litigation against a director, there will be a conflict of interest between the company, represented by the board of directors, and the individual director. Section 2:256(146) contains a solution for this problem. It states that a company shall be represented by the members of its supervisory board in all matters where there is a conflict of interest with one or more directors. However, the articles of association are free to provide otherwise and the general meeting of shareholders shall always have the power to designate one or more other persons for such purpose. It should be remembered that section 2:256(146) only gives the members of the supervisory board the power to *represent* the company; in general it does not give them the power to *decide* for the company. As exceptions to this rule, both Maeijer and Van der Grinten[151] state that the supervisory board members have the power to hold a director liable on the grounds of mismanagement and to dissolve the employment contract with a director[152]. In those cases where section 2:256(146) does not give the supervisory board members the power to decide, a separate decision by the board of directors or the general meeting of shareholders will be required.

In our opinion, the right to allow the company to sue its directors is not a minority right in the strict sense of the word under Dutch company law. The reason for this is that even though the shareholders may decide to sue, this decision has to be taken in the context of a general meeting of shareholders. Because the law contains no specific provisions on this subject, such a decision requires a simple majority. Finally, the right to allow the company to sue its directors can be limited by a discharge from liability by the general meeting. Dutch company law contains no provisions regulating discharge; it is usually arranged in the articles. It is generally agreed that the general

[151] See Asser-Maeijer, 2-III, no. 295 and Van der Heijden-Van der Grinten, no. 278.
[152] See also HR 5 November 1954, NJ 1956, 321.

meeting of shareholders has the power to discharge the directors from liability and that this discharge only has effect in the relationship between the company and its directors, and therefore does not affect the position of third parties. Discharge does not extend beyond what is known to the shareholders from the documents that they are aware of; it does not cover what they reasonably could have known or what they should have anticipated[153]. However, discharge means that the company loses the right to sue the directors with regard to the subjects that are covered by the discharge, even if the directors have deliberately or carelessly harmed the interests of the company[154].

53. Grounds for company to sue directors.

Section 2:9

There are three possible grounds on which the company could base its action against a director. The first is section 2:9. It states that each director is responsible to the legal person for the proper performance of the duties assigned to him. It is interesting that the second sentence of section 2:9 states that each director is individually responsible and liable should the board of directors collectively fail to perform properly, unless the individual director can prove that the shortcoming is not attributable to him and that he was not negligent in not acting to prevent the consequences. For liability on the grounds of section 2:9 it is required that a serious reproach can be made against the director, to be decided on the basis of all the circumstances of the given case[155]. The fact that the director is liable to the company under section 2:9 does not mean that he is also liable to the individual shareholders.

Section 6:74 and 6:75

A second ground on which the company can hold its directors liable and sue them is section 6:74, breach of contract. However, the directors have an obligation to perform to the best of their ability, not an obligation to guarantee a certain result. Van

[153] See Staleman v. Van de Ven, HR 10 January 1997, NJ 1997, 360 ('… it cannot be accepted that a discharge would extend to information that the individual shareholder is otherwise aware of - outside the context of the general meeting - or to information that does not appear from the annual accounts or has not been reported otherwise to the general meeting before it adopted the annual accounts').
[154] See Ellem Beheer BV v. De Bruin, HR 20 October 1989, NJ 1990, 308 ('… even if De Bruin, by acting in the way he did, had, either deliberately or negligently, harmed the company').
[155] See HR 10 January 1997, NJ 1997, 360.

Schilfgaarde concludes that sections 6:74 and 6:75 hardly play a role alongside section 2:9[156].

Section 2:248(138)

Section 2:248(138) contains a more specific provision of director liability. This liability is limited to the situation where the company has been declared bankrupt. However, it does not give the company the right to sue its directors but rather grants this right to the trustee in bankruptcy. It is therefore not an enforceable shareholder right, not even by a resolution of the general meeting of shareholders, because in bankruptcy, the constituent bodies lose their power over the property of the company. However, in order to conduct his task properly, the trustee in bankruptcy can be expected to make use of all the instruments the law provides him.

Because section 2:248(138) is only applicable in the event of bankruptcy, it will usually be the creditors and not the shareholders that benefit from the action that the trustee in bankruptcy may institute.

IV.6 Right to receive a minimum dividend

54. Maximum and minimum dividends. As mentioned earlier (see no. 5) Dutch company law contains no provisions that entitle a shareholder to receive a certain minimum dividend should the general meeting of shareholders legitimately decided not to declare a dividend. Dutch company law contains several provisions that limit the dividend a company can pay. The most important one is section 2:216(105) subsection 2. It states that a company may make distributions to the shareholders and other persons entitled to distributable profits only if its net assets exceed the sum of the amount of the paid and called-up part of the capital and the reserves which must be maintained under the law or the articles of association.

A different dividend regime applies to preference shares,. Usually, a certain fixed percentage of their nominal value is payable as dividend on these preference shares. This percentage may be seen both as a minimum dividend (in the sense that the company cannot pay dividend on normal shares until all dividend claims on preference shares have been paid) and as a maximum dividend (because these preference shares usually limit the dividend payable to a fixed percentage of the nominal value).

IV.7 Pre-emption rights in respect of actual or potential share capital increases

[156] Van Schilfgaarde, no. 47.

55. Pre-emption rights in respect of share capital increase. This subject has been briefly covered nos. 12, 29 and 55 above. We described there that, in general, existing shareholders have a pre-emption right in the event of a capital increase, but that the general meeting of shareholders by resolution may decide to restrict or exclude its pre-emption right, or it may decide to transfer its power to decide over the pre-emption right to another constituent body, or that the pre-emption right does not exist with regard to preference shares. In addition, we can mention the following. The pre-emption right is not a right that is specifically aimed at the protection of minority shareholders. Its aim is not only to protect all shareholders financially against the dilution of their share capital, but also to protect their controlling rights. Subsections 1-3 together constitute an elaborate system of pre-emption rights, with possibilities to diverge from this by the articles. The general rule is that each existing shareholder has a pre-emption right when new shares are issued.

However, the law then states as a second general rule that 'normal' shareholders do not have a pre-emption right with regard to preference shares and that preference shareholders do not have a pre-emption right with regard to normal shares. Divergence from both these parts of the second general rule is possible through the articles. The existing shareholder does not possess a pre-emption right with regard to shares issued for a non-cash contribution, again provided that the articles do not state otherwise. Finally, if no divergence in the articles is possible, the existing shareholder shall not have a pre-emption right in respect of shares issued to employees of the company or to shares issued by a group company.

IV.8 Right to apply for the dissolution of the company

56. Dissolution as protection for minority shareholders. As mentioned earlier, the dissolution of the company is the equivalent of the 'death penalty' in company law. Earlier no. 49), we discussed this option within the framework of the inquiry proceedings and showed that a careful weighing up of all the interests involved has to take place before such a decision is taken. The dissolution of the company is not a remedy that a disgruntled shareholder will make frequent use of. If he is committed to terminating his relationship with the company, there are other more efficient ways of reaching this outcome. Among them are selling his shares on the market (listed NV)

or to another individual (unlisted NV and BV) as well as the exit option provided by the rules regulating the settlement of disputes (see no. 65). However, because there may well be situations in which the dissatisfied minority shareholder sees no other option, we will discuss it here.

In addition to the inquiry proceedings, Dutch law contains some more provisions on the subject of dissolution. First, sections 2:19-2:21. Section 2:19 subsection 1 contains a limited list of the reasons why a company may be dissolved. We will only discuss those relevant to minority or other shareholders. Subsection 1 sub a states that a legal person shall be wound up by a resolution of its general meeting of shareholders. The law does not state any specific procedures or majorities (see no. 31). Subsection 1 sub f states that a legal person shall be wound up by the District Court in the instances provided by the law. Section 2:21 subsection 4 states that a concerned party, which will include a minority or other shareholder with a reasonable interest in the dissolution, may demand dissolution of the company on four grounds. The first three, defects in its formation, articles not complying with the statutory requirements and not falling within the statutory description of its legal type, do not appear to be of relevance for a minority shareholder. The fourth ground (section 2:21 subsection 3) is of more interest. It states that the court *may* wind up a legal person if it transgresses the prohibitions set in Book 2 for its legal type or acts contrary to its articles to a serious degree. This dissolution ground can, in our opinion, be seen as a final way in which a disappointed minority shareholder can enforce the legal protection rights that the law and the statutes offer him. It is probably not the exercise of this right itself that protects the minority shareholder but rather the *opportunity* to exercise the right to ask for dissolution that serves as a protective device for minority shareholders. In any event, we are unaware of examples in case law where a minority or other shareholder has exercised the right that section 2:21 subsection 3 offers him.

IV.9 Rights relating to the listing of the company's shares

57. Direct rights when listing or delisting. We mentioned earlier no. 7) that Dutch company law hardly contains any provisions that differentiate between listed and unlisted companies. Therefore, in Dutch company law there is no explicit provision that states that seeking a listing on a recognised exchange requires the approval of the general meeting of shareholders, nor is there a specific provision that provides a

minority of shareholders the right to seek admission of the shares to a listing on a recognised stock exchange.

58. Indirect rights when listing or delisting. Even though the general meeting possesses no directly enforceable rights with regard to obtaining a listing, it does possess three important rights that can be qualified as indirect rights. These are the right with regard to conversion (section 2:18), the right with regard to the issue of shares (section 2:206(96)) and the right to amend the articles of association (section 2:231(121)). At Euronext Amsterdam, only NVs are capable of obtaining a listing. This means that a BV that wants to obtain a listing needs to convert itself into an NV. Section 2:18 states that this conversion requires a 9/10 majority of the votes cast, giving a 10% minority a blocking right. In a situation where a company has decided to obtain a listing on a recognised exchange, it usually also needs to amend its articles. The law does not prescribe a qualified majority for this but the articles usually do, thereby offering the minority an effective blocking right. Provisions in the articles that most frequently need amendment when obtaining a listing include the conversion of registered into bearer shares (section 2:82, even though the listing of registered shares is now possible at Euronext Amsterdam) and the elimination of any clause restricting the free transfer of shares. Under normal circumstances, obtaining a listing on a recognised exchange will be accompanied by the issue of new shares[157]. Section 2:96 states that the new shares can only be issued by a resolution of the general meeting of shareholders, giving the majority of shareholders an opportunity to block the listing of the shares should none of the existing shareholders be willing to float his shares on the exchange.

Finally, if a company wants to terminate its listing, Euronext Amsterdam, as part of its policy, demands that the majority, controlling, shareholder put out a so-called 'sweep bid' to the remaining minority shareholders before it will agree to end the listing.

IV.10 Emergency action

59. Kort geding and immediate measures in the inquiry proceedings. As mentioned earlier, Dutch company law contains two proceedings that can be used by minority

[157] Even though it is possible for existing shares only to be offered at the IPO.

shareholders to institute an emergency action. These are the request for immediate measures in the context of an inquiry proceedings and the initiation of a Kort Geding. The request for immediate measures is usually heard within a week, with the delivery of the judgement straight after the hearing[158]. A Kort Geding is heard as soon as is required by the case; section 289 subsection 2 Code of Civil Procedure even states that in the event of great urgency, this can take place on a Sunday at the residence of the President of the District Court. For a more comprehensive discussion of these two proceedings, please refer to the nos. 10 and 49.

V General remedial rights

V.1 Derivative action

60. Definition and existence. The general rule is that when a company has suffered a loss, it is up to the company to initiate an action in order to reclaim this loss. However, some jurisdictions enable a shareholder, either in his own name or on behalf of the company, to sue the legal person that has brought the damage on the company. This damage can be caused by someone related to the organisation (for example, a director), but also by a third party with no previous relationship with the company. The reason why a shareholder would want to sue is that the loss that the company has suffered usually results in a decline in the value of his shares. Current Dutch company law contains none of the above possibilities. It is impossible for a shareholder to initiate an action to reclaim the loss against a director or against anyone else, either under his own name or in name of the company,[159].

However, this absence of the possibility of a derivative action has not been without discussion. For example, a limited form of a derivative action was included in a 1910 law proposal. Section 49a of that proposal conferred upon every shareholder representing the company the power to initiate an action against a director that had brought a loss on the company if he had not been discharged or the general meeting had explicitly decided that it would not initiate an action[160]. However, the final law

[158] See Asser-Maeijer, 2-III, no. 518.
[159] See the explanation with the altered proposal of law to amend the Commercial Code, in: Belinfante, p. 217 ('The individual shareholder thus has no independent action to reclaim that damage which he suffers indirectly, i.e. the damage that he suffers as a shareholder because the company suffers a loss').
[160] See Belinfante, p. 129.

proposal did not contain such a provision[161]. Writers, too, have been critical about the absence of the derivative action in Dutch company law.

Prins[162] in his dissertation states the following: 'It seems intolerable that where , because of a wrongful act, the majority and/or the directors havecaused the company loss, the wrongdoers can prevent the company from initiating an action. It is accordingly strongly urged that the derivative action be maintained and developed. … It is submitted that Dutch law should have a derivative action'. Timmerman, too, argues for the derivative action to be included in Dutch company law[163], asking the question 'Should we in the Netherlands strive to introduce the derivative action?' and answering 'I would answer this question carefully in the affirmative'.

Even though written Dutch company law contains no provisions that explicitly make a derivative action possible, it is possible to imagine that Dutch courts, in one way or another, would enable such an action. This is, however, not the case, as was made clear by the Supreme Court in the case of Poot v. ABP[164].

In the case of Poot v. ABP, the Supreme Court decided that 'should a third party bring a loss on the company by not duly performing his contractual obligations against the company or by acts that are wrongful against the company, only the company has the right to reclaim this loss from the third party'. It continued by stating that 'In principle this (initial) loss does not confer upon the shareholders the power to initiate their own action for compensation against the third party. It is up to the company to seek compensation for the loss caused to it by the third party, in order to protect the interests of all those who have an interest in preserving the property of the company'.

It is clear that this Supreme Court decision makes a derivative action impossible. Important to note, however, is that this Supreme Court decision does not fully rule out the possibility of a shareholder initiating an action against someone whose actions have led to a decrease in the value of his shares. Before such an action can be successful, the shareholder must prove that the third party has breached a specific standard of due care against him personally. Interesting to note is that the minister, in the explanation with the altered proposal of law to amend the Commercial Code, stated something rather similar. 'Situations are imaginable where a shareholder suffers a completely personal loss by a tort of a director. In such a situation of individual damage, he does have an action'.

An example of a situation in which a third party has breached a specific standard of due care against a shareholder, and that shareholder therefore has an individual claim for damages, can be found in the case of Kip and Sloetjes v. Rabobank[165]. In this case, the Supreme Court did allow a shareholder to initiate an action against a third party because it had breached a specific standard of due care against the shareholder. What also seems to have played a role in this decision is that the shareholder was forced to sell his shares, meaning that even if the company reclaimed the loss, the shareholder would not benefit from this.

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[161] See Belinfante, p. 259-260. The minister clarified this choice by stating 'An action, such as was given to the individual shareholder in these sections, does not seem to be well enough motivated. It is better to leave the decision to the general meeting of shareholders'.
[162] See Prins, p. 57-59.
[163] See L. Timmerman, *Van afgeleide schade naar afgeleide actie (From derived damage to derived action)* in: *Conflicten rondom de rechtspersoon (Conflicts around the legal person)*, Serie monografieën vanwege het Van der Heijden Instituut, no. 62, 2000, p. 24.
[164] See HR 2 December 1994, NJ 1995, 288.
[165] See HR 2 May 1997, NJ 1997, 662.

V.2 Right to challenge the validity of assembly resolutions

61. Null and void and nullification. In nos. 12 and 67 we briefly discussed section 2:15 that regulates the nullification of resolutions. We would now like to add the following. Dutch company law offers a wide range of possibilities to challenge the validity of resolutions in a legal person. Especially relevant are sections 2:14-2:16. A first distinction that has to be drawn is that between being null and void and nullification. Resolutions that are null and void have no validity right from the start (*ab initio*); they bring about no changes in legal relationships. A resolution that can be nullified however, is in principle a valid resolution until the court decides to nullify the resolution. On the basis of section 3:53 subsection 1, this nullification has retroactive effect (*ex tunc*); a situation is created as if there has never been a valid resolution. Another important issue to remember is that not only resolutions of the general meeting of shareholders can be null and void or may be nullified. Sections 2:14-16 are applicable to the resolutions of all the constituent bodies of the company.

Should a minority or other shareholder be of the opinion that a resolution is null and void, he may act in a way as if there was no resolution. In addition, he has the power to call upon the fact that the resolution is null and void in each legal proceedings, both as plaintiff and as defendant. Moreover, the court will *ex officio* have to apply the fact that the resolution is null and void. However, should the minority or other shareholder wish to act against the company that executes a resolution which is, in his view, null and void, he needs to initiate legal action. Section 3:302 makes it possible to demand a declaratory ruling; the minority or other shareholder then receives a declaratory judgement that the resolution is null and void. What are the grounds for declaring a resolution to be null and void? We can mention five[166]. First, a resolution of which the content or the purport is contrary to the law or the articles is null and void unless another consequence follows from the law. Second, a resolution is null and void if it is contrary to statutory provisions or provisions in the articles that regulate the powers of the constituent bodies of the company. Third, a resolution is null and void if it has been passed even though a previous act of or message to someone other than the constituent body that has passed the resolution fails, when such was required by the law or the articles. A fourth ground on which a resolution can be null and void is that

[166] See Van Schilfgaarde, no. 95.

it has been passed contrary to fundamental provisions regulating the coming into effect of resolutions. Finally, conflict with public order or good morals (section 3:40 subsection 1) is a reason for declaring a resolution null and void.

For the grounds for nullification of a resolution please refer to no. 27. So what relevance do these grounds for being null and void and for nullification for the position of the minority shareholder now have? In our opinion, all the grounds, possibly with the exception of conflict with public order or good morals, on which a resolution can be null and void can be characterised as 'normalising' minority rights. By referring to the fact that a resolution is null and void, a minority or other shareholder can prevent the company deviating from the right track, viewed from the point of company law. With regard to nullification, the most important form of minority protection lies in the test whether the resolution lives up to the standards of reasonableness and fairness. This allows the judge, albeit in a marginal way, to check whether the legitimate interests of the minority shareholders have been given the weight they deserve.

62. Null and void or nullified; and then? Assuming that a minority or other shareholder succeeds in getting the court to decide in a declaratory judgement that a resolution is null and void or that he succeeds in having a resolution nullified, in some situations this means that he will have reached his goal; he has prevented company policy that he did not approve of. In many other cases, however, it leads to a situation in which the company is rudderless. Moreover, the law does not forbid the constituent body passing the same or a similar resolution again. In most circumstances, the constituent body will have passed the resolution with the aim of reaching a certain goal. Now that the resolution no longer exists, this goal will not be reached[167]. The reason for this is that, in general, the court does not have the power to pass resolutions in the name of the company. Only with regard to specific situations does the law contain exceptions to this principle. We shall now list the remedies the Enterprise Section can order within the context of the inquiry proceedings.

[167] See for this problem also L. Timmerman's contribution *Dient de rechter voor een rechtspersoon besluiten te kunnen vaststellen? (Should the court be able to pass resolutions on behalf of the company?)* to the collection *Knelpunten in de vennootschapswetgeving (Bottlenecks in company legislation)*, Uitgave vanwege het Instituut voor Ondernemingsrecht Rijksuniversiteit Groningen no. 24, 1995.

An atypical judicial decision can be found in the case of Baus v. De Koedoe (HR 21 May 1943, NJ 1943, 484, see also no. 5). Not only did the Supreme Court in this case decide that the consequence of a conflict with *bona fides* was that the resolution was null and void and not that it may be nullified – however, it should be remembered that this decision was given under the old section 46a of the Commercial Code and not under the new section 2:14 – what is more interesting is that the Supreme Court stated that 'in general, reasonableness demands that, if the company in the determination of the profit has acted contrary to the principle of *bona fides* against the person entitled to share in the profit, the court will decide the extent to which the determined profit will have to be altered with regard to that person'. In addition, the Supreme Court also decided that the opinion that once it has been decided that a resolution is null and void, the company first has to again determine the profit before the person entitled to share in the profit may claim an amount of money from the company, was incorrect. In our opinion this means that the court has passed a resolution in the name of the company, resulting in the situation that a third party can directly obtain a claim on the company.

Indirectly by means of section 2:8, a situation may be created in which the company, after nullification of a resolution, does not remain rudderless. First, it can be demanded on the basis of section 2:8 that the court orders certain shareholders to cast their votes in a certain way. This order can be supported by imposing a penalty payment. A second, more direct way, is that section 2:8 gives the minority or other shareholder the power to demand that the court impose an obligation on the company to pass a specific resolution.

An example of this can be found in the case of Van Rees v. Smits, The Hague Court of Appeal 1 October 1982, NJ 1983, 393. In this case the Court decided that the claim 'that *bona fides* with regard to the new resolution to be passed by the general meeting of shareholders means that this meeting will decide that NLG. 49,200 will be divided amongst the shareholders from the general reserves' could be sustained. In this decision we see that the Court is prescribing how the general meeting must decide, without passing the resolution itself in name of the company.

This order, too, can be supported by a penalty payment. The possibility that section 3:300 offers goes even further. On the basis of this section, the court may decide that its decision is fit for specific performance, meaning that the court can determine which decision in its opinion should have been taken and adds the consequence that its judgement will have the same legal power as the decision of those that should have taken the decision would otherwise have had.

There are a few examples in established case law. We can mention the case of Uniwest v. Van Klaveren, Arnhem Court of Appeal, 26 May 1992, NJ 1993, 182. In this case, the Arnhem Court of Appeal went further than the Hague Court of Appeal in the aforementioned case of Van Rees v. Smits. Not only did the Arnhem Court of Appeal decide what the decision should have looked like in its view, it added, in this specific case an order to pay the dividend to the amount that the Court ruled reasonable.

However, despite all this, the constituent body has still not passed the required resolution. Therefore, writers have argued that a broader power to pass resolutions in name of the company should be conferred upon the court through statutory provisions,[168].

V.3 Protection through the intervention of judicial or other public authorities

63. Intervention by judicial or other public authorities. Apart from the measures and actions mentioned elsewhere in this report, most notably the inquiry proceedings, see nos. 46-49, Dutch company law contains no provisions that enable an action by a public authority following an application for relief by individual shareholders or specific minorities.

VI Squeezing out and exit

64. Squeezing out. Dutch company law contains two different sets of proceedings which, either at the request of the large shareholder or at the requestof the minority shareholder, enable a minority shareholder to terminate his shareholding in the company. Even though in both proceedings the same result is obtained, the proceedings differ fundamentally. The first proceedings is described in sections 2:335-343 (the rules concerning the settlement of disputes), the second in section 2:201a(92a). In no. 64 we will describe section 2:336 and section 2:201a(92a), which provide the large shareholder with the possibility to squeeze out a minority shareholder. In no. 65 we will describe the corresponding right of a minority shareholder, i.e. the right to be bought out (section 2:343).

Section 2:336 contains as a rule that one or more holders of shares who, solely or jointly, contribute at least one-third of the issued capital may institute proceedings against any shareholder, who, by his conduct, prejudices the interests of the company

[168] See in particular L. Timmerman *Dient de rechter voor een rechtspersoon besluiten te kunnen vaststellen? (Should the court be able to pass resolutions on behalf of the company?)* in the collection *Knelpunten in de vennootschapswetgeving (Bottlenecks in company legislation)*, Uitgave vanwege het Instituut voor Ondernemingsrecht Rijksuniversiteit Groningen no. 24, 1995, who pleads for the coming into effect of a section 2:8a. This section should contain the provision that if a legal person is in default of passing a resolution that it should pass on the basis of the law, the articles or the principles of reasonableness and fairness (section 2:8), the court may pass the resolution in the name of the company.

to such an extent that the continuation of his shareholding cannot reasonably be tolerated, demanding the transfer of his shares. This proceedings can be applied to the BV and the NV, the articles of which exclusively provide for registered shares, contain restrictions on transfer and do not permit the issue of bearer depositary receipts with the co-operation of the company. This means that the rules concerning the settlement of disputes are not applicable to listed NVs. It is remarkable that a shareholder is only required to provide one-third of the issued capital in order to be able to squeeze out another shareholder; this could lead to a situation where a minority is able to squeeze out a majority in the company. The purpose of the rules concerning the settlement of disputes, and therefore also of the corresponding exit right, as described in section 2:343, is the termination of a deadlock in the company; the proceedings try to provide a solution should there be irreconcilable differences of opinion between groups of shareholders in the company. The rules concerning the settlement of disputes themselves can be seen as a concrete elaboration of the principles of reasonableness and fairness (section 2:8). Maeijer gives the example of Pres. Rb. Alkmaar, 16 April 1985, TVVS 1985, p. 204, in which case the President of the District Court considered that under certain circumstances the principles of reasonableness and fairness mean that a shareholder can be forced to co-operate with a transfer of his shares[169]. Also interesting to note is section 2:336 subsection 2 which determines that the company itself, even if it owns shares in itself, is not entitled to initiate proceedings to squeeze out its own shareholders.

When are the conditions for the application of section 2:336 met? A general rule cannot be given, partly because case law on this topic is rather scarce. The following four issues, however, seem to play a role in the squeezing out proceedings of section 2:336. First, it has to concern behaviour of the shareholder *in that capacity within the context of the company*[170]. Second, a characteristic trait of the squeezing out proceedings seems to be that the decision-making within the company is in deadlock. Third,and related to the previous issue, the conflict between the groups of shareholders needs to be lasting; a mere temporary difference in opinion does not suffice. Finally, the company's continued existence must be in doubt due to the lasting deadlock in the decision-making within the company.

The squeezing out proceedings consist of two stages. In the first stage the court decides whether it can indeed no longer reasonably be tolerated that this shareholder remains a shareholder in the company. If the court decides that this is the case, the second stage commences. The court shall then appoint one or three experts to report in writing on the price of the shares (section 2:339 subsection 1). When determining the price of the shares, the experts must set the price at the value they expect the shares to have on the date the court's

[169] See Asser-Maeijer, 2-III, no. 493. At the time of this case, the rules concerning the settlement of disputes had not yet come into force.

[170] See OK 27 October 1994, NJ 1996, 167, in which case the Enterprise Section considered that 'to this extent the condition that Muller's behaviour *as a shareholder* (too) prejudices *the interests of the company* is then met …'.

decision becomes final. After having received the experts' report, the court independently determines the price to be paid for the shares (section 2:340 subsection 1), taking into account the effects on the price of unexpected events between the date of reporting by the experts and the date of actual transfer. When the court's decision becomes final, the defendant-shareholder is obliged to transfer his shares. The plaintiff-shareholder is obliged to accept these shares against cash payment of the determined price (sections 2:341 subsection 1 and 2:340 subsection 2). If the defendant remains in default in delivering his shares, then the company shall transfer the shares on his behalf against simultaneous payment (section 2:341 subsection 4).

Even though the buying out proceedings of section 2:201a(92a) result in the same situation that a shareholder is forced to transfer his shares in the company to another shareholder, this proceedings differs strongly from the squeezing out option in the rules concerning the settlement of disputes both in character and in the way it is given shape. The purpose of the section 2:201a(92a) proceedings is not the settlement of conflicts within the company. Its aim is to meet the serious objections that may exist for a large shareholder when there remains a small minority (5% or less of the issued capital) of shareholders in 'his' company. Among them are the fact that certain attractive fiscal constructions, the so-called fiscal unity between parent and subsidiary, cannot be applied, the fact that one continuously has to take into account the interests of the small minority when taking certain decisions, for example, when declaring a dividend and when concluding agreements, and the burden of still having to fulfil certain formal requirements. The formal proceedings with regard to general meetings of shareholders and the annual accounts can be mentioned in this respect. Finally, the company cannot benefit from the less strict rules for the annual accounts as described in section 2:403 (see also no. 68). The purpose of the proceedings logically means that the large shareholder must initiate proceedings against *all* other minority shareholders; the buying out proceedings do not purport to buy out only certain minority shareholders whose shareholdings trouble the large shareholder. This proceedings can therefore be characterised as a weighing up of the interests of the large shareholder and those of the minority shareholder(s) *in abstracto*.

Within the context of the application of section 2:201a(92a) a material test is therefore not applied; the minority shareholder's behaviour is irrelevant, it is not necessary that the minority shareholder prejudices the interests of the company or of the large shareholder. The only thing that the plaintiff must make sufficiently likely is that he does indeed provide at least 95% of the issued capital and that he has issued a writ of summons against all minority shareholders. If not all of the minority shareholders appear in court, the Enterprise Section will *ex officio* investigate whether these two conditions have been met. Section 2:201a(92a) in principle provides the large shareholder with the unrestricted right to demand the buying out of the minority shareholders. However, section 2:201a(92a) subsection 4 makes three exceptions to this rule: if, not withstanding compensation, a defendant would sustain serious tangible loss by the transfer, if a defendant is the holder of a share in which, under the articles,

a special right of control of the company is vested, or if a plaintiff has, as opposed to a defendant, renounced his power to institute such proceedings. In all these cases, the court disallows the proceedings against *all minority shareholders.* Finally, it is theoretically possible that in exceptional circumstances section 3:13 (abuse of power) or 2:8 subsection 2 (the 'derogatory' effect of the principles of reasonableness and fairness) prevent the buying out of the minority shareholders. Another difference compared with the rules concerning the settlement of disputes is that the court is under no obligation to appoint experts to report on the price of the shares to be transferred. A final difference compared with the squeezing out option in the rules concerning the settlement of disputes is that the buying out proceedings of section 2:201a(92a) may also be applied to listed NVs.

Proceedings related to that in section 2:201a(92a) are those described in sections 2:311 subsection 2 and 2:325 subsection 2. They state with regard to a legal merger that if a shareholder in the disappearing company is not even entitled to receive a single share in the merged company, he can be paid in cash. Section 2:325 subsection 2 limits the amount of cash so distributed to 10% of the nominal value of the shares that are used as payment. This not only means that the squeezing out option in the case of a legal merger is very limited, but also that there is no exit right for minority shareholders in the case of a legal merger[171]. However, in a recent decision by the President of the Amsterdam District Court[172], it was decided that the instrument of a legal merger may be used to squeeze out minority shareholders, *even if the only reason for the legal merger is that the merging companies do not want to be permanently troubled by the presence of minority shareholders*[173].

65. Exit. Section 2:343 may be regarded as the complement to the aforementioned section 2:336. This section gives a minority or other shareholder the option to exit the company if the continuation of his shareholding can no longer reasonably be expected of him. The reason for the fact that continuation of his shareholding can no longer be expected of him must be based in actions by one or more other shareholders, meaning that actions of the company which cannot be attributed to shareholders are not taken into account, even though it is not required that these other shareholders act in their capacity of shareholder[174]. Another difference compared with the proceedings of section 2:336 is that for the shareholder to be allowed to exercise his legal exit right, it is not necessary that the actions of the shareholders have also damaged the interests of the company. Similar to the proceedings of section 2:336, the section 2:343 proceedings consist of two stages, the first stage ending with the judgement that continuation of his shareholding can no longer reasonably be expected of the

[171] See for this topic also R.W.Th. Norbruis, *Het failliet van de juridische fusie als overnemingsinstrument (The bankruptcy of the legal merger as a take-over device)*, TVVS 1991, no. 2, p. 31.
[172] Pres. Amsterdam District Court, 11 June 1999, JOR 1999, 174.
[173] See on the subject of the squeezing out of minority shareholders after a merger also P.F. van den Berg, *De weg naar volledige fusie* (*The road to a complete merger*), Ondernemingsrecht 2001, p. 420-427.
[174] See for example OK 22 October 1992, NJ 1993, 411 ('… the claim of a minority shareholder can also be successful when his interests are damaged to the extent that the continuation of his shareholding cannot reasonably be expected of him because of actions by one or more of his fellow shareholders, not in their capacity as shareholders' , OK 9 December 1993, NJ 1994, 296 and OK 20 November 1997, NJ 1998, 392.

disgruntled shareholder. A strange aspect of the section 2:343 proceedings is that the value of the shares must be established as of the date of the expected transfer. This means that a shareholder who wishes to exit the company only receives the depressed value for his shares, even though the decrease in the value of his shares has usually been caused by the shareholder to whom he sells his shares under the dispute settlement proceedings. The Supreme Court decision in Poot v. ABP[175] will in most cases prevent the exiting shareholder instituting separate proceedings against the acquiring shareholder to reclaim his damages (see also no. 60).

In no. 64, we mentioned that the rules concerning the settlement of disputes are not applicable to listed NVs. Shareholders in these companies therefore do not posses a legally enforceable exit right. However, Euronext Amsterdam policy is that before the exchange agrees to the termination of a listing, it demands that the company that wishes to terminate its listing makes a reasonable exit offer to the remaining shareholders. The rationale behind this condition is that otherwise those shareholders remaining in the company would lose their easily executable exit right through the market, meaning that they would be more or less 'stuck' in a non-listed company.

It is remarkable that Dutch company law does not contain proceedings to complement the proceedings of section 2:201a(92a), i.e. the right for minority shareholders in a company in which a single shareholder provides at least 95% of the issued capital to be bought out. This is even more remarkable when one observes that under the rules concerning the settlement of disputes there are both proceedings to squeeze out a shareholder and proceedings to be bought out.

VII Limits to the exercise of rights protecting minority shareholders

66. Limits. In Dutch company law, reasonableness and fairness play a pivotal role. These concepts prevent misuse by minority shareholders of legal instruments they use against the company.

Perhaps the greatest opportunity for disappointed shareholders to trouble a company is section 2:15, the opportunity to ask the court to nullify a resolution of the company on the grounds that it is contrary to any statutory provision, the articles or the principles of reasonableness and fairness. However, we know of no case where asking the court to nullify under section 2:15 was unreasonable to such an extent that it could be qualified as abuse of a legal right. In such a case, section 2:15 subsection 3 sub a enables the court not to materially hear the case but to straightaway rule that the plaintiff has no reasonable interest in his claim for

[175] See HR 2 December 1994, NJ 1995, 288.

nullification. This does not mean that there are no situations imaginable where exercising the right to ask for nullification, or any other right provided to minority shareholders in company law, can amount to abuse of right. We think that this is particularly the case when a minority shareholder exercises a right with no other intention than to harm others. An example of a case in which the plaintiff's actions can be qualified as conflicting with the principles of reasonableness and fairness, but do not quite amount to abuse of right, is the case of Van den Berge v. Verenigde Bootlieden BV (HR 31 December 1993, NJ 1994, 436). In this case, Van den Berge asked the courts in three instances to nullify two resolutions from the general meeting of shareholders on the grounds that they conflicted with statutory provisions, the articles and/or the principles of reasonableness and fairness as described in section 2:15. These resolutions made it possible to transfer the power to issue new shares to the board of directors and included an exclusion from the pre-emption rights that the existing shareholders in the company had in relation to the proposed share issue. The underlying thought was that certain shareholders who in the old situation had a stake of less than 5%, would receive the opportunity to increase their holdings to 5% for tax purposes. Van den Berge lost in all three instances; all the judges ruled that the single fact that his holding would be reduced from 19.25% to 18.5% (or 18.33%) was not enough to qualify the resolutions as conflicting with law, articles or reasonableness and fairness.

Other examples in which the plaintiff's claims were denied because they were in conflict with reasonableness and fairness, but which could not in our opinion be qualified as abuse of right, are the case of Smits v. Van Rees (HR 19 March 1976, NJ 1978, 52) and of Lampe v. Tonnema BV (HR 17 May 1991, NJ 1991, 645). In the Smits v. Van Rees case, the articles contained the provision that a person, in order to be eligible for appointment as director, needed to hold at least a certain number of shares. Those same articles contained a provision that allowed a small minority of shareholders to block the transfer of the required shares to the director. The Supreme Court ruled that under these circumstances, the fact that the director did not hold the number of shares required by the articles did not prevent a legally valid appointment of the director. In the Lampe v. Tonnema BV case, the plaintiff asked the court to nullify a resolution of the general meeting of shareholders to amend the articles. This amendment was necessary to make the sale of the company possible; a proposal that was supported by nearly all of the shareholders and in the interests of the company but that was not supported by Lampe.

As mentioned earlier (see no. 49) section 2:350 subsection 2 in the inquiry proceedings is also aimed at preventing the abuse of rights. This section makes it possible for the company to claim for damages from the plaintiffs should the Enterprise Section decide that the application was not made on reasonable grounds.

VIII Minority rights and groups of companies

67. Law concerning groups of companies. Dutch company law contains no systematic body of provisions that regulate the law concerning groups of companies.

Only sections 2:24a-c may be considered as provisions specifically aimed at regulating the system of corporate groups. Section 2:24a defines when a company can be considered as a subsidiary of another company, section 2:24b gives a definition of a group and section 2:24c defines what a participation is under Dutch law. However, certain aspects of company law, for example the statutory two-tier regime, the annual accounts, capital protection, the inquiry proceedings and voting rights, differ for groups of companies.

For Dutch company law, the point of departure is the single BV or NV. Under Dutch company law, a collection of companies is considered to be a group when a number of legally independent companies are organisationally connected in an economic unit. Therefore, each group possesses three characteristics: economic unity, they are organisationally connected and have central management. Because Dutch company law lacks systematic regulation with regard to groups of companies and because minority shareholder protection has never received much attention, it is not surprising that Dutch company law does not deal systematically with the position of the minority shareholder in corporate groups[176]. Because of the scope of this report, we will not give an elaborate description of Dutch company law with regard to groups of companies[177]. We will focus on those aspects relevant to the position of minority shareholders.

68. Minority protection in groups of companies. Minority protection in corporate groups can be dealt with from several angles. If we take a chronological approach to corporate groups, we can draw a distinction between protection at the stage of incorporation, protection at the stage of operation and protection at the stage of dissolution. In this report, we will restrict ourselves to minority protection during the operation of the corporate group. The other two stages have been dealt with extensively earlier in this report for the individual company; the differences for corporate groups are not so great that they justify discussion here.

Another distinction that can be drawn is that between minority protection at the parent company level and minority protection at the subsidiary level. This distinction is useful because the problems at both levels differ fundamentally. At a parent company level, the underlying thought behind minority protection in corporate groups is to prevent minority protection offered for the individual company being too easily avoided through the use of subsidiaries. We can characterise this as the extrapolation of minority protection to corporate groups. At a subsidiary level, the reason for minority protection is fundamentally different. Here the minority is in need of protection because there is a tension in corporate groups between legal independence and economical unity. The parent company controls the subsidiary, but policy that

[176] Maeijer for example states in Asser-Maeijer, 2-III, no. 607 that 'statutory rules and established case law that purport to protect a minority of shareholders can be applied both to the individual company and to the corporate group'.

benefits the parent, or the group as a whole, does not necessarily also benefit the subsidiary.

At the parent company level

Here the aim is to prevent corporate groups being used to evade the protection offered to minority shareholders in individual companies. When approaching this problem, we shall use the following distinction[178]. Dutch company law on groups falls into three categories.

a) General company law provisions which do not relate specifically to group relationships but which are of special relevance for them.
b) General company law provisions which are interpreted in a special way with regard to group relationships.
c) Specific group law provisions.

Provisions that fall under categories a) and b) will usually be relevant for the protection of minority shareholders at a subsidiary level and will therefore be discussed in the next section. For the protection of minority shareholders at a parent company level, category c) is the most relevant. This category can be further divided into four subcategories[179].

c1) Definitions of group relationships (see no. 67).
c2) Scope-extending provisions.
c3) Facilitating provisions.
c4) Regulatory provisions.

Scope-extending provisions

Sections 2:207(98), 207d(98d) and 228(118) concern the repurchase of own shares. Even though these rules are primarily aimed at the protection of creditors, they also protect minority shareholders.

With regard to the inquiry proceedings, an important recent decision was given in the Bot Bouw Groep inquiry, OK 27 April 2000, JOR 2000, 127. The point of departure has long

[177] We refer to Timmerman's contribution *Corporate groups in the Netherlands* to *I gruppi di società*, written for the *Convegno internazionale di studi*, Venice, 1995 (hereafter Timmerman), p. 313-354.
[178] This same distinction is also used in Timmerman, p. 319-329.
[179] See also Timmerman, p. 324.

been that shareholders only possess the power to demand an inquiry into the policy of the company in which they hold shares and therefore not into the policies of subsidiaries. In the Bot Bouw Groep decision, the Enterprise Section put this principle into perspective. It ruled that the request to order an inquiry into the policy and the conduct of business of the parent company and, if necessary, of its subsidiaries could be sustained. The Enterprise Section based this decision on the statement that 'otherwise it would be impossible to obtain a correct view of the policy and conduct of business of the parent company'. This decision means that if a group of shareholders who provide at least 10% of the issued capital in the parent company suspect that this parent company is using subsidiaries to harm the legitimate interests of minority shareholders in the parent company, it may demand an inquiry in which the policies and the conduct of business of the subsidiaries are also the subject of the inquiry. Even though this decision reveals a tendency towards a more 'corporate group'-like approach to the inquiry proceedings, it is still unclear to what extent the minority shareholder in the subsidiary can also make the policy of the parent company the subject of the inquiry.

At a subsidiary level

In general, minority protection at a subsidiary level is provided through the same legal facilities as minority protection for an individual company. Among the most important provisionsare[180]:

section 2:15; the power to ask the court to nullify a decision by the subsidiary;

section 2:237(128); the right for the general meeting to receive all the information it requests;

section 2:343; exit option in the context of the rules concerning the settlement of disputes[181];

sections 2:345 and 2:346; shareholders representing 10% of the issued capital may demand an inquiry.

An example of the protection that the inquiry proceedings may offer to minority shareholders at a subsidiary level can be found in the Zinkwit inquiry (OK 14 January 1993, NJ 1993, 460 and OK 27 May 1993, NJ 1993, 724). This case concerned the protection of minority shareholders in KMZM NV, a subsidiary of VM. KMZM, the subsidiary, had sold its most valuable subsidiary, Trimetal. It had planned to use the proceeds of this sale to strengthen its other subsidiary. Awaiting a good opportunity to do so, it had lent out the proceeds of the sale of Trimetal to group companies in the AUM group. VM, KMZM's parent company, was also part of this AUM group. When lending out the proceeds, more than 75% of the value of the company, KMZM had not obtained any security or guarantees for repayment. The Enterprise Section decided that this behaviour meant that there were well-founded reasons for doubting the correctness of KMZM's policy . In this conclusion, the position of minority shareholders in KMZM played an important role. The Enterprise Section considered, for example, that 'KMZM's company responsibility means that serious attention must be drawn to the … so that reasonable safeguards are created to protect the interests of minority shareholders.

[180] See also Timmerman, p. 347.

[181] Even though the text of section 2:343 seems to indicate otherwise, the other shareholders need not act in their capacity as shareholders (see OK 22 October 1992, NJ 1992, 411). It suffices that continuation of his shareholding cannot reasonably be expected of the minority shareholder. See also Bartman/Dorresteijn, *Van het concern (Of the corporate group)*, 2000, p. 26-27, hereafter referred to as Bartman/Dorresteijn.

KMZM should provide a reasonable explanation to minority shareholders about the relevant considerations and about the conclusions reached'. The Enterprise Section ruled that all relevant circumstances should be taken into account, which included the interests of the minority shareholders in KMZM and the relationship between the parent company VM and subsidiary KMZM. Finally, the Enterprise Section decided that this relationship between parent company and subsidiary not only means that KMZM is dependent on VM to a certain extent, but also that the parent (VM) should carefully take into account the interests of the minority shareholders at a subsidiary level.

In the Zinkwit inquiry, we observe that minority protection at a subsidiary level not only concerns material requirements, making sure that the interests of the minority shareholders are carefully taken into account, but that it also contains requirements with regard to the distribution of information to minority shareholders at a subsidiary level. From the Hyster and Howson-Algraphy inquiries (OK 23 June 1983, NJ 1984, 571 and OK 29 August 1985, NJ 1986, 578), it has become clear that a subsidiary can be held accountable for the fact that the parent company has failed to provide enough information to, amongst others, minority shareholders[182]. This also implies that the subsidiary company has to individually assess the decisions it has to take.

A similar picture is shown by the Bobel inquiry (OK 2 January 1992, NJ 1992, 329, HR 6 October 1993, NJ 1994, 300 and OK 17 April 1997, NJ 1997, 672). In this case, too, the subsidiary Bobel sold all its assets and lent out the proceeds to other companies within the group without obtaining any security.

Section 2:403 contains a protection for minority shareholders that we have not previously discussed. It states that, in principle, a legal person which forms part of a group need not present its annual accounts in accordance with the provisions of Part 9 of the Civil Code. However, this derogation is only allowed when all shareholders have declared their approval in writing. Therefore, section 2:403 subsection 1 subparagraph b gives each shareholder in the subsidiary company a blocking right with regard to the derogation from the provisions in Part 9.

IX Conclusion

69. Exit, voice and loyalty. In an excellent essay, Hirschman[183] has explained that any organisational member who is dissatisfied with the policy conducted by the organisation has a choice of two options to show his objections: he can either *exit* the organisation or make use of the participation rights within the organisation (*voice*) (see no. 5). In Hirschman's opinion, feelings of loyalty towards an organisation may cause an organisational member to choose the *voice* option. He then continues to form

[182] Both the Hyster and the Howson-Algraphy inquiries concerned the duty to provide information to the works councils and the labour unions. However, as Bartman and Dorresteijn concluded, this duty must be extended to include minority shareholders (see Bartman/Dorresteijn, p. 259).

a part of the organisation and will try to change the policy of the organisation from within. The legal position of a minority shareholder can be analysed in terms of Hirschman's *exit, voice* and *loyalty*. For a good understanding of the position of minority shareholders under Dutch company law, three issues are of importance.

a. A characteristic of Dutch company law is that shareholders are expected to be loyal to their company and to the interests pursued by this company. This loyalty point of departure has the consequence that the *exit* option for the minority shareholder under Dutch company law has not been fully elaborated. After all, exit is synonymous with disloyalty (see no. 5).
b. Under Dutch company law, a shareholder may exercise his voting right at the general meeting of shareholders to serve his own interests, but he must also always act in accordance with the demands of reasonableness and fairness (see no. 9). This means that he must also take into account the interests of others who play a role in the company as well as the so-called 'company interests', which purport to protect the continuity of the company, (see no. 27). Under Dutch company law, the shareholder is not entirely free to exercise his voting right as he wishes. The exercise of the *voice* option is bound by certain restrictions.
c. In Dutch companies, capital and control are not always in line with each other. A shareholder who provides the majority of the capital in a company does not necessarily effectively control this company (see no. 4). A minority shareholder does not control the company. Under Dutch company law, it is unclear when a shareholder controls the company (see also no. 4). This means that the concept 'minority shareholder' is not sharply defined in Dutch company law. Sometimes, a shareholder who provides the majority of the capital of a company is a minority shareholder with regard to the exercise of control in the company. In other cases, a shareholder who provides only a limited percentage of the company's capital can have considerable control rights because of the special nature of the shares he possesses. This is one of the reasons why the subject of protection of minority shareholders has thus far not been strongly developed (see nos. 1 and 2). In the Netherlands, we do not know exactly what a minority shareholder is. Much depends on the structure chosen by the company through its articles of association. Structure of capital and that of control can diverge strongly.

[183] See A.O. Hirschman, *Exit, voice and loyalty: responses to decline in firms, organizations and states*, Harvard University Press, 1990 (reprint).

d. Traditionally, Dutch law has not fully elaborated the protection of minority shareholders because, in general, shareholders have a weak position in Dutch company law and the Dutch legislator has traditionally feared that a strong position for minority shareholders would harm the efficiency of the decision-making process within the company (see no. 1).

70. Exit. Dutch company law does not contain any self-exercising exit rights.

a. With regard to listed companies, the Dutch legislator does not oblige the shareholder who effectively obtains control of a company to make an offer for the remaining shares of the other shareholders (see no. 29). Herein, the fact that it is difficult to determine when a shareholder controls the company, at least with regard to Dutch listed companies, has undoubtedly played a role.
b. Furthermore, it is remarkable that a shareholder who provides 95% of the company's capital has the right to squeeze out the remaining shareholders (see no. 64), but that the remaining shareholders do not have the corresponding right to be bought out (see no. 65). In accordance with this, the majority shareholder is allowed to use the instrument of a legal merger to squeeze the minority shareholders out of the company in which they participate and subsequently force them to participate in another company (see no. 64). The legal instrument usually used to achieve this is the triangular merger. However, after the implementation of the legal merger, the minority shareholders do not possess the right to be bought out (see also no. 64). Only if an NV or a BV is converted into a non-commercial legal entity, for example an association, co-operative or foundation, do the minority shareholders have an exit right if they voted against the conversion at the general meeting of shareholders (see no. 29). In such cases, the damages payable to the exiting shareholders are determined by independent experts, who are appointed by the court. It is unclear why the Dutch legislator has provided for an exit right in certain cases of conversion but not in the case of a legal merger.
c. With regard to unlisted companies, the exit right has been given shape in the rules concerning the settlement of disputes (see no. 7). Dutch company law does not contain an independent exit right. A shareholder can only make use of the exit right as provided for in the rules concerning the settlement of disputes if he succeeds in proving in court that he is being harmed by the actions of one or more of his fellow shareholders to the extent that continuation of his shareholding can

no longer be reasonably expected of him (see no. 65). If he succeeds, the court then determines the price to be paid for his shares (see no. 40). It is remarkable that this price is determined on the date on which the claim to exercise the exit right was brought before the court. In determining the value of the shares, the exiting shareholder is not compensated for any decrease in the value of his shares caused by the unreasonable behaviour of the majority or other shareholder that took place before the exit proceedings were brought before the court. In addition, the doctrine as developed by the Supreme Court for derived or indirect damages usually prevents the exiting shareholder from successfully reclaiming the damage resulting from a decrease in the value of his shares, for example on the basis of tort, from the majority or other shareholder in separate proceedings (see no. 60).

71. Voice. Dutch company law contains several instruments that the minority shareholder can use to try to change the policy conducted by the company and the majority shareholder through the exercise of his participation rights. These possibilities to correct the company's policy are not vested in a deliberately and consistently thought-out system of minority protection in commercial legal entities (see nos. 25 and 31). Dutch company law contains a fairly randomly put together basket of measures that can be used to protect the interests of minority shareholders. Minority shareholders' participation rights can be divided into the following categories.

a. Instruments that the minority shareholder can use in order to block certain resolutions or policy; these are the so-called *negative participation rights of the minority shareholder (see nos. 26-31).*
b. Instruments that the minority shareholder can use in order to ensure that the company respects the law and the articles of association; these are the so-called *normalising participation rights of the minority shareholder (see no. 5).*
c. Instruments that the minority shareholder can use in order to force the company into adopting a new and different policy; these are the so-called *positive participation rights of the minority shareholder (see nos. 20-25).*

Re. a. Negative participation rights. Dutch company law does not contain many instruments that the minority shareholder can use to block policy advocated by the company or the majority shareholder. Under Dutch company law, there are hardly any

blocking minorities with regard to the adoption of important resolutions. However, Dutch company law does provide ample options for the minority shareholder to demand nullification of company resolutions (see nos. 27 and 61). It is likely that the Dutch legislator has provided the minority shareholder with ample options to seek nullification because it is the court and not the minority shareholder himself that decides on the nullification.

Re. b. Normalising participation rights. With regard to a number of issues, the convocation of the mandatory yearly general meeting of shareholders (see no. 21), the compliance of the annual accounts with the law (see no. 14), the Dutch legislator has created easily accessible court proceedings. It is particularly remarkable that the Dutch legislator has not provided a group of minority shareholders with the option to initiate an action to reclaim damages on behalf of the company from third parties that have caused damage to the company (see no. 60).

Re. c. Positive participation rights. A minority shareholder can try to adjust the policy of the company by requesting the Enterprise Section of the Amsterdam Court of Appeal to initiate an inquiry into the policy and the conduct of business of the company (see nos. 46-49). In particular, the imposition of immediate measures on the company by the Enterprise Section can force a company to adjust its policy (see no. 49). Also relevant for minority shareholders is the existence of the option to demand that the court decide that its judgement is fit for specific performance against the company on the basis that the company or the majority shareholder has breached its duties arising from the principles of reasonableness and fairness (see no. 62).

72. Loyalty. The aforementioned minority rights must always be exercised according to the principles of reasonableness and fairness. They must not be misused (see no. 66). It is remarkable that Dutch courts hardly ever deny a minority shareholder's claim on the grounds of the abuse of right, but nearly always judge the content of the claim. This becomes even more remarkable when we consider that for the exercise of a minority right the Dutch legislator often demands that the minority shareholder has a reasonable interest in exercising this right (see also no. 66).

73. The principle of equality. Dutch company law contains the principle of equality to the extent that shareholders are in equal circumstances (see nos. 12 and 41). With regard to unlisted companies, it is assumed that divergence from this principle is allowed on several grounds, for example if divergence is in the interests of the

company (see no. 41). The principle of equality is applied more strictly to listed companies, partly because of the strict securities law on this topic (see no. 42).

74. The right to receive information. Openness is an important condition for effective protection of minority or other shareholders[184]. Under Dutch company law, an individual shareholder has the right to receive information (see no. 46). This right should in principle be exercised within the context of the general meeting of shareholders. However, the company may refuse to provide the requested information if such is in the best interests of the company as a whole. To the extent that it can be reasonably expected that the information would have an impact on the share price, Dutch securities law makes it impossible for the board of directors to use the argument of 'best interests of the company as a whole' to justify providing information to certain large shareholders but not to minority shareholders (see no. 43). In the practice of Dutch company law, the right to demand an inquiry is an important way of obtaining information about the company (see nos. 46-49). Dutch legislation with regard to the annual accounts leaves a fairly wide margin of appreciation to the board of directors. This may mean that the annual accounts do not provide as much information as the minority shareholder would like (see no. 38). Besides the accountant, Dutch company law does not provide for an entity that supervises the content of annual accounts on its own behalf. If a minority shareholder objects to the content of the annual accounts, he himself must bring his objections before the Enterprise Section (see no. 14).

75. Perspectives. We strongly recommend that the legislator adjusts the following issues of Dutch company law in order to improve the position of minority shareholders.

a. *The Dutch legislator shouldenable a derivative action (see no. 60)*; this derivative action could take the following form: disgruntled minority or other shareholders first request the company itself to initiate the action. If the company does not acquiesce to this demand, the requesting shareholders should be able to initiate the action themselves *in the name of the company*. The proceeds of the derivative

[184] See G. Suetens-Bourgeois, *De verhouding meerderheid-minderheid in de naamloze vennootschap* (*The relationship between the majority and the minority in the public limited company*), p. 374-375.

action should also flow to the company, with the shareholders who have initiated the action receiving just compensation to cover their expenses.

b. *The opportunities for minority shareholders to exit the company should be improved*; the introduction of a mandatory offer for all remaining outstanding shares if a shareholder has obtained a certain percentage of the voting rights or if he can control the company should be considered (see no. 29). Furthermore, if only 5% (or less) of minority shareholders remain in a company, these shareholders should be given an exit option that can easily be exercised (see no. 65).

c. *The opportunities to impose normalising measures on the company should be improved*; it should be easier for the court to impose enforceable judgements on the company at the request of minority shareholders (see no. 62).

Appendix I

Shareholder structure in Dutch listed companies

Composed by J. Groot

Company	Index	Shareholder with voting right 25-50%		Shareholder with voting right >50%	Shareholders with voting rights 5-25%												Total	AK		Total +
Aalberts Industries	other				5.03	5.07	5.12	7.85	13.03								36.90	24.97		61.87
ABN Amro Holding	AEX				7.49												7.49	57.78		65.27
Accell Group	other				5.05	5.09	5.09	5.27	6.77	6.86	10.22	11.43					55.79			55.79
Aegon	AEX			54.50													54.50			54.50
Ahold, Kon.	AEX																0.00			0.00
AFC Ajax	other			75.00	5.45												78.45			78.45
Aimo	other				5.06	5.30	5.61										15.97			15.97
Airspeas	other				5.14	5.66	7.70	13.34	13.34								45.20			45.20
AKZO Nobel	AEX																0.00			0.00
Alanheri	other																0.00	92.88		92.88
Arcelorland	AMX				4.96	5.05	5.20	5.20	5.68	5.75	5.98						37.42			37.42
Arcelsedars Commodities	other	38.90			10.52												49.42			49.42
Ardonov	NMAX																0.00			0.00
AOT	other				1.39	5.36											6.75			6.75
Arcadis	other	31.10			5.17	5.20	6.60	12.10	15.21								75.38			75.38
ASM International	AMX																0.00	22.27		22.27
ASML Holding	AEX				4.92	9.30											14.22			14.22
Athlon Groep	other				5.01	5.05	5.05	5.10	5.59	6.50	6.50	7.73	8.25	13.08			67.86			67.86
Ballast Nedam	other		46.00														46.00			46.00
BAM NBM, Kon.	other				3.97	5.00	5.13	5.21	5.23	5.23	7.36	8.33	10.09	10.16	10.41	12.13	88.25			88.25
BE Semiconductor Industries	AMX			56.80													56.80			56.80
Bieber Bed Holding	other				5.18	5.31	5.62	5.69	5.86	6.65	11.25	14.12					59.72			59.72
Biewer Holding	other			75.20													75.20			75.20
Blue Fox Enterprises	other	39.08			4.80	4.88	5.26	5.35	5.53	5.53	15.15						85.60			85.60
Blydenstein Willink	other	37.04			5.01	5.01	10.50	12.92									70.48			70.48
Boskalis Westminster, Kon.	other																0.00	99.06		99.06
Brill, Kon.	other																0.00	96.56		96.56
Brunel International	other			60.66	5.00												65.66			65.66
Bulkmare	AEX				4.96	5.47	6.30	8.80									25.53	37.31		62.84
Bungman Heybroek	other	27.58	49.88		4.48	5.00											86.94			86.94
CITAC- Aliga	NMAX			53.56	5.01	5.69	15.62										79.88			79.88
Cap Gemini	other			54.00													54.00			54.00
Caelio Control	NMAX	32.00			17.68												49.68			49.68
Cebo, Tos, Kon.	other				5.01	5.30	5.30										15.61			15.61
CNG	AMX																0.00			0.00
Copaco	other			63.95	5.80	11.24											80.19			80.19
Corus Group	AMX																0.00			0.00
Crown van Gelder	other																0.00	98.10		98.10
Crucell	other				5.25	5.29	6.80	7.20	7.60	7.60							39.74			39.74
CSM	AMX																0.00	89.50		89.50
CSS Holding	other				5.02	5.04	5.53	6.30	12.46	22.71							57.05			57.05
Delft Instruments	other																0.00	79.70	9.43	89.13
Dico International	other			70.10	5.15	5.59	7.62										88.45			88.45
DNC De Nederlanden Comp.	other			68.00													68.00			68.00
Docdata	other				5.06	5.10	5.19	10.31									25.66			25.66
DPA Holding	NMAX				5.37	5.50	6.96	13.93	19.21	23.47							74.14			74.14
Draka Holding	AMX	26.51	36.50		5.39	5.42	5.49	13.72									93.03			93.03
DSM	AEX				4.87	4.95	5.08	5.08	6.30	8.70							34.68			34.68
Econosto, kon.	other				5.18	5.57	6.87	7.75	10.00	10.52	15.10						60.99			60.99
Elsevier	AEX																0.00			0.00
Emis	other				5.01	5.65	6.30	6.30	7.10	10.83	11.32						52.51			52.51
Enks Groep	other																0.00	93.90		93.90
EVC International	other			89.7	4.47	5.46	16.39	16.90									43.22			43.22
Exact Holding	other				12.76	17.44	17.44	17.44									65.08			65.08
Exendis	other	37.90	37.90		5.30	6.30	6.30										93.70			93.70
Fornix Biosciences	other			64.80	9.00												73.80			73.80
Fortis NL	AEX				5.24	5.30	6.71	9.65									26.90			26.90
Fox Kids Europe	other			76.00													76.00			76.00
Frans Maas Groep, Kon.	other				6.27	10.01											16.28	81.21		97.49

Company	Index	Shareholder with voting right 25-50%		Shareholder with voting right >50%	Shareholder with voting rights 5-25%											Total	AK		Total +
Free Record Shop Holding	other	43.66	43.86		10.18											97.50			97.50
Fugro	other				1.00	5.39	6.70									13.09	66.72		79.81
Gamma Holding	other				5.82	5.94	5.95	5.76	5.92	6.66	7.02	11.57				52.66			52.66
Getronics	AEX				3.30											3.30	16.31		19.61
Gemeke	other				5.37	5.08	5.21	5.49	6.03	6.05	8.02					40.99	22.43		63.42
Geveke Vleuwaat Holding	other															0.00	48.40	51.60	100.00
Geotech, Kon.	other															0.00	36.00	41.97	77.97
Geotimij	other															0.00	90.14		90.14
Gucci Group	AEX	25.80	32.28													25.80			25.80
Hagemeyer	AEX				4.97											4.97	19.82		24.79
Heek-Twekks, van	other			55.25	10.37	12.88										78.20			78.20
Heineken	AEX			50.01												50.01			50.01
Helmet Holding	other	39.09			10.99											10.99	85.70		96.69
Heijmans	other				5.95	5.95	5.95	5.95								23.80			23.80
HES Beheer	other															0.00	99.20		99.20
Hitt	INMAX			51.10	5.14	5.25										61.49			61.49
Holland Colours	other	43.40														43.40	56.25		99.65
Hollandse Beton Groep HBG	other				5.85	5.05	5.05	5.34								20.49			20.49
Hoop Effectenbank, Van Der	other				4.95	5.36	5.36	5.54	8.98	9.03	10.08	23.95				73.10			73.10
Hunter Douglas	AMX															0.00			0.00
ICT Automatisering	other				4.89	5.09	5.13	5.15	5.68	9.93						35.06			35.06
IHC Caland	AMX				5.95	5.97										11.42			11.42
Imtech	other				4.73	5.11	5.15	5.24	6.16	10.05						36.35			36.35
ING	AEX															0.00	100.00		100.00
Innoscscapits	INMAX			72.21	8.53											80.74			80.74
Intemato Muller	other															0.00			0.00
IspTis	other				4.80	5.32	7.30	7.30	7.70	13.30						45.72			45.72
Ispat International	other			96.30												96.30			96.30
Kas-Associatie	other				5.82	6.50	10.33									21.85	66.75		88.60
Kempen & Co	other				4.29	5.09	5.13	6.25	10.51							31.27			31.27
KLM	AMX	25.00			11.67											36.67			36.67
Koninklijke Olie	AEX															0.00			0.00
KPN, Kon.	AEX	43.50														43.50			43.50
KPNQwest	AEX	49.46	49.46													98.92			98.92
KSI Inoenational	INMAX	35.55		54.89	4.50											85.54			85.54
Kulima + Heitz	other	43.94			5.26	10.04										59.24			59.24
Landis Groep	AMX	42.30			5.30	5.11	5.16	5.21	5.35	5.67	6.55	9.13				89.50			89.50
Lanschot, Van	other				10.86	10.86	10.86	10.86								43.44	26.17	10.14	61.75
Laurus	AMX															0.00	98.97		98.97
LDI Technologg Group	other				5.00	5.12										10.12			10.12
Libertel	AMX			70.00	7.50											77.50			77.50
Macintosh Retail Group	other				4.33	5.00	5.07	5.24	10.80							30.44			30.44
Magnus Holding	other				2.00	5.21										7.21	61.40		68.61
McGregor Fashion Groep	other				5.82	5.13	11.40	12.04	17.20	17.20						67.99			67.99
Mijalee Holding, Van der	AMX				5.00	5.00	5.06	12.65								27.71			27.71
Naeff	other			97.05												97.05			97.05
Nagron	other															0.00	88.63		88.63
Nedcon Groep	other															0.00	99.90		99.90
Nedlloyd, Kon.	AMX				5.00	5.03	5.04									15.07			15.07
Nedschroef Holding, Kon.	other	25.62			8.19	1.11	1.61	1.61	5.00	6.11	14.80					56.05			56.05
Newaps Electronics	other			57.10												57.10			57.10
Newcaremy	INMAX				4.85	5.19	5.27	5.70	5.80	6.38	6.68	12.61				52.40			52.40
New Skies Satellites	other				14.45											14.45			14.45
Numico, Kon.	AEX				4.89											4.89	99.95		104.84
Nutreco Holding	AMX				5.01	5.05	10.01									20.07			20.07
Nyloplast	other	49.00			12.00	16.00										77.00			77.00
Oce	AMX				6.33											6.33	20.80		27.13
OPG Groep	other				6.54	6.61	8.58									21.73			21.73
Oxitec	AMX				5.05	9.89										14.94			14.94
Petroplus International	other				5.00	5.05	5.11	5.12	6.32	12.84	23.27	24.12	24.12			110.96			110.96
Philips Electronics, Kon.	AEX				3.15											3.15			3.15
Pink/Raccado	AMX	34.20			3.75	5.25	5.25	5.51	5.51	12.10						71.57			71.57
Polynorm	other				5.82	5.20	5.20	10.50	17.93							49.65	67.50		111.35
Porcelaineye Fles	other			62.00	5.00	5.00	12.00									84.00			84.00
Priority Telecom	other															0.00			0.00
Pralcon Holding	INMAX				4.78	7.57	8.19	9.04	9.30							38.88			38.88

Company	Index	Shareholder with voting right 25-50%		Shareholder with voting right >50%	Shareholder with voting rights 5-25%												Total	AK		Total +
Randstad Holding	AMX	44.00			5.14	6.94	9.23	17.90									83.21			83.21
Reesink	other				23.25												23.25	60.79		84.04
Ried Textheuse	other	49.90															49.90			49.90
Rijto Smeets de Boer	other																0.00			0.00
Samas-groep	other				5.01												5.01	99.70		104.71
Scala Business Solutions	other				7.00	7.05											14.05			14.05
Schuitema	other	25.02		72.89													97.91			97.91
Schutterswald	other	39.85			5.01	5.01	5.06	5.08	5.30	9.15							74.50			74.50
Seagull Holding	other				4.24	4.47	4.96	5.17	5.16	5.76	5.76	7.68					43.14			43.14
Simac Techniek	other			62.59													62.59			62.59
Sligro Beheer	other				5.00	5.02	5.06	5.11	5.19	5.52	7.36						38.20	46.86		85.06
Smit Internationale	other				4.91	5.01	5.02	5.06	5.10	5.36	5.48	5.55	7.23	11.60			60.33			60.33
SNT Groep	other			51.00	5.00	5.00	5.14	5.78	7.50								79.42			79.42
Sopheon	other																0.00			0.00
Stern Groep	other	49.90			8.97	4.90	4.90	5.35	11.00	11.77	19.04	19.59	19.59				147.01			147.01
Stork	other				5.02	5.36	5.42	6.54									22.34			22.34
Telegraaf, De	other	28.66			5.00	5.12											39.00	45.86		84.86
Textielgroep Twente	other			82.62													82.62			82.62
TIE Holding	NMAX			58.27	4.58	5.07											67.92			67.92
TPG	AEX	43.60															43.60			43.60
Tulip Computers	other																0.00			0.00
Twentsche Kabel Holding	other				6.60												6.60	93.21		99.81
Unilever	AEX				4.99	21.64											26.63	47.75		74.38
Unit 4 Agresso	AMX				5.13	10.90	21.90	21.90									59.83			59.83
United Services Group	other	42.66															42.66			42.66
UPC	AEX			61.85	8.15												70.00			70.00
Vedior	AMX																0.00	27.50	72.50	100.00
Veenbos KBB	AMX				1.06												1.06	61.25		62.31
Versatel Telecom	AEX	25.90			4.90	5.06	7.71	10.00	12.45								66.04			66.04
Vilenzo International	other			66.66	5.31	5.57	8.56	12.55									98.36			98.36
VNU	AEX				5.38	9.96											15.23			15.23
Volker Wessels Stevin, Kon.	other																0.00	92.88		92.88
Vopak, Kon.	AMX	25.76															25.76	32.63		58.39
Vredestein	other																0.00	99.97		99.97
Wegener	other																0.00	100.00	15.90	115.90
Wessanen, Kon.	AMX				5.00												5.00	98.87		103.87
Wolters Kluwer	AEX																0.00	88.70		88.70
Totaal	153		38	31														52		

This exhibit has been derived from company filings under the Disclosure of Major Holdings in Listed Companies Act 1996, filed until the reference date of 1 October 2001.
In certain cases, the percentages have been updated on the basis of information provided by the companies. All companies are Dutch public limited companies, listed on an EU exchange.

In the first columns of the exhibit one can find an overview of the major shareholdings. In the next columns one finds the shareholdings between 5 and 25%. In the columns indicated with "AK" one finds the voting right percentages held by so-called Administratiekantoren (voting trusts).

For a good understanding of this exhibit, the following should be kept in mind:
Although this overview is based on the company filings until the reference date, it does not show the exact voting rights percentages at the reference date.
A company filing shows the voting right percentage held by a shareholder at the moment of reporting. If the percentage changes within the bandwidths of 5-10%, 10-25%, 25-50%, 50-66 2/3% or 66 2/3-100%, the shareholder is under no obligation to report such change in percentage. Moreover, a shareholder is under no obligation to report the fact that he has entered another bandwidth if this is not caused by his own transaction (e.g. in case the company issues new shares). Therefore, this overview should be seen as an approximate image of the real voting rights structure, which is as accurate as possible, but not perfect. Consequently, simply adding up the voting right percentages in order to obtain a complete picture of the shareholdings larger than 5% is misleading, as this total may be more or less than the actual total (as shown in the exhibit, it can even be greater than 100%). The Dutch Disclosure of Major Holdings in Listed Companies Act 1996 does not result in complete transparancy of voting right percentages and does not yet provide a fully dynamic record of shareholder structures.